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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]52

OTTO H. KAHN AND HENRI P. WERTHEIM VAN HEUKELOM, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ABRAHAM WOLFF, DECEASED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 11, 1920.

(27,677)

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OCTOBER TERM, 1920.

No. 334.

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1 I. *Petition and Exhibits "A" and "B."*

Filed July 2, 1917.

In the Court of Claims of the United States.

No. 33809.

OTTO H. KAHN and HENRI P. WERTHEIM VAN HEUKELOM, as Executors of the Last Will and Testament of Abraham Wolff, Deceased,

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, Otto H. Kahn and Henri P. Wertheim van Heukelom, as executors of the last will and testament of Abraham Wolff, deceased, late of Morristown, in the County of Morris, in the State of New Jersey, respectfully represent:

I.

That on June 13, 1898, the President of the United States approved an act entitled "An act to provide ways and means
2 to meet war expenditures and for other purposes" (30 Stat., 448, 464-5), by section 29 of which legacies and distributive shares arising from personal property became subject to a tax. The portions of said section 29 material to this case are as follows:

"Section 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say:

"Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and evey hundred dollars of the clear value of such interest in such property.

"Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

* * * * * * *

3 "Where the amount or value of said property shall exceed, the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred dollars, the rates of duty or tax set forth shall be multiplied by one and one-half; * * * and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

II.

That on June 27, 1902, the President of the United States approved an act, entitled "An act to provide for refunding taxes paid upon legacies and bequests for uses of a religious, charitable, or educational character, for the encouragement of art, and so forth, under the act of June thirteenth, eighteen hundred and ninety-eight, and for other purposes" (32 Stat., 406) of which section 3 is material in this case, and reads as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

4 III.

On or about October 1, 1900, your petitioners' decedent, Abraham Wolff, a citizen of the United States, and of the State of New Jersey, and a resident of Morristown, Morris county, in said State, departed this life, leaving a valid last will and testament, which said last will and testament was thereafter, on or about November 7, 1900, duly admitted to probate in the Orphans' Court of said County and State, a court of competent jurisdiction, and that thereupon letters testamentary thereunder were duly issued to your petitioners, who qualified as such and ever since have been, and now are, the duly qualified and acting executors of said last will and testament. A certified copy of said last will and testament, marked "Exhibit A," and a certificate of the issue of letters testamentary on said last will and testament, marked "Exhibit B," are filed herewith and are prayed to be read and considered as a part of this petition. Your petitioner, Henri P. Wertheim van Heukelom, is referred to in said certificate as Henri P. Wertheim and is the Henri P. Wertheim therein named and who was duly qualified as executor, as aforesaid, and said petitioner thereafter came to be known and is now lawfully known as Henri P. Wertheim van Heukelom.

IV.

Portions of said last will and testament material to this case are as follows:

"Second. I confirm the conveyance to my daughter Clara of the house in which I reside No. 33 West Fifty-seventh Street in the City of New York, by deed dated January third, 1896. I also confirm to her the gift of the contents of the house. The gift includes all the household furniture and goods of every kind, silverware, pictures, bronzes and other works of art and articles of use and ornament which the house contains. The house with all its con-
5 tents is to be charged to my daughter Clara at One hundred and fifty thousand dollars against the advance of Two hundred thousand dollars which I have credited to her upon my books.

"I confirm the advance of Two hundred thousand dollars which I have heretofore made to my daughter Addie.

"I give and bequeath to my daughters, and the survivor of them, all my horses, carriages, sleighs, harness and stable equipment and appurtenances, to be divided between them if both survive in such manner as they may determine themselves. If they do not agree the division shall be made by my executors.

"Fourth. I give and bequeath to the following, the following sums, that is to say:

* * * * * * *

"To my nephew Edward S. Steinam Fifteen thousand dollars.
"To my nephew Louis Keller Fifteen thousand dollars.
"To my nephew Louis Elson Fifteen thousand dollars.

* * * * * * *

"Sixth. I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Flora Wolff for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided, and until my said trustees shall receive the aforesaid principal sum I do hereby direct my executors to pay out of the income of my estate to my niece Flora Wolff, the sum of One hundred and twenty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Seventh. I give and bequeath to my trustees, their survivors and successors, Fifty thousand dollars, in trust, however, to invest
6 and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the income and interest arising therefrom to my niece, Matilda Steinam for and during her life, and upon her death I direct that the same be added to and form part of my residuary estate to be disposed of as hereinafter provided, and until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my niece Matilda Steinam, the sum of One hundred and fifty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Eighth. I give and bequeath to my trustees, their survivors and successors, Forty-thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Nellie Morris for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Nellie Morris, the sum of One hundred and twenty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Ninth. I give and bequeath to my trustees, their survivors and successors, the sum of Twenty thousand dollars, in trust, however, to

invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my nephew Louis S. Myer, for and during his life, and upon his death I direct that the same shall be added to and form part
7 of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said nephew Louis S. Myer, the sum of Sixty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Tenth. I give and bequeath to my trustees their survivors and successors, Twenty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my nephew Alfred E. Frank for and during his life, and upon his death I direct that the same shall be added to and form part of my residuary estate to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said nephew Alfred E. Frank the sum of Sixty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Eleventh. I give and bequeath to my trustees, their survivors and successors, the sum of Sixty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Rosa Keifer for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Rosa Keifer, the sum of One hundred and eighty dollars a month. The foregoing bequest, is, however, upon the condition that so much of the income of the said trust as shall be neces-
8 sary for the purpose, shall be applied by my trustees to the payment of the premiums on the policy of life insurance by the Michigan Mutual Life Insurance Company of Detroit, for Five thousand dollars on the life of Louis Keifer, which I now hold, if and so long as it shall be held by my estate after my death. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Twelfth. I give and bequeath to my trustees, their survivors and successors, Fifty thousand dollars, in trust, however, to invest and

keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Fanny Elson for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum I do hereby direct my executors to pay out of the income of my estate to my said niece Fanny Elson the sum of One hundred and fifty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Thirteenth. I give and bequeath to my Trustees, their survivors and successors, Fifty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my sister Babette Myer for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum I hereby direct my executors to pay out of the income of my estate to my sister Babette Myer the sum of One hundred and fifty dollars a month.
The foregoing provision is, however, subject to the provis-
9 ions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Fourteenth. I give and bequeath to my trustees, their survivors and successors, Eighty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my sister Athalie Frank for and during her life, and upon or in case of her death to hold Sixty thousand dollars, that is to say six-eighths of such Eighty thousand dollars, in trust if Fannie Phillips, the daughter of my said sister Athalie Frank, shall be living, to invest and keep invested the same in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to the said Fannie Phillips for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate to be disposed of as hereinafter provided, and the remaining Twenty thousand dollars, that is to say the remaining two-eighths of the said sum of Eighty thousand dollars, shall upon the death of my said sister Athalie Frank be added to and form part of my residuary estate to be disposed of as hereinafter provided, but if my said sister Athalie Frank shall survive her said daughter Fannie Phillips then upon the death of my said sister the entire amount of the said principal sum of Eighty thousand dollars herein set apart for her benefit shall be added to and form part of my residuary estate

to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said sister Athalie Frank the sum of Two hundred and fifty dollars a month. If my sister Athalie Frank shall die before me, and her daughter, the said Fannie Phillips, shall survive me, then and in such a case and until my said trustees shall receive the aforesaid principal sum of Sixty thousand dollars, I do hereby direct my executors to pay out of the income of my estate to my niece the said Fannie
10 Phillips, the sum of One hundred and sixty dollars a month. The foregoing provision is, however, subject to the provision contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Fifteenth. I give and bequeath to my trustees, their survivors and successors, Sixty thousand dollars in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Carrie Rauch, for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to said niece Carrie Rauch the sum of One hundred and Sixty Dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and Thirty-fifth article.

"Sixteenth. I give and bequeath to my trustees, their survivors and successors, Twenty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my nephew Benjamin Frank, for and during his life, and upon his death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said nephew Benjamin Frank the sum of Sixty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Seventeenth. I give and bequeath to my trustees, their
11 survivors and successors, Sixty thousand dollars, in trust, however, to invest, and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Tillie Lehrbuzger for and during her life, and upon her death I direct that the same shall be added to and form

part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Tillie Lehrburger, the sum of One Hundred and sixty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Twentieth. I give and bequeath to my trustees, their survivors and successors, One hundred thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my sister Lottie Elson for and during her life, and the income and interest of Forty thousand dollars thereof after her death to her husband Julius Elson during his life, should he survive her; and upon her death I direct that the Sixty thousand dollars of the principal, and if she shall survive her husband the whole of the principal, and upon his death, he surviving her, the Forty thousand dollars of the principal shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my sister Lottie Elson the sum of Three hundred and seventy-five dollars a month, if living, and if not I direct them to pay out of the income of my estate to Julius Elson, the husband of my sister Lottie Elson, one hundred and twenty-five dollars a month until my said trustees shall receive the said Forty thousand dollars. The foregoing provision is, however, subject to the provisions contained in the
12 Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Twenty-first. I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Nanette Jacobs for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Nanette Jacobs, the sum of One hundred and twenty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Twenty-second. I give and bequeath to my trustees, their survivors and successors, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Celia Loeb for and during her

life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Celia Loeb, the sum of One hundred and twenty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

"Twenty-fourth. I give and bequeath to my grand-nephew, Stanley L. Wolff, son of my nephew Lewis S. Wolff, the watch worn by me at the time of my death and Ten thousand dollars, such Ten thousand dollars, to be paid to him on his reaching his twenty-
13 first birthday, if he shall live so long, and if at the time of my death he shall not yet have reached that age.

* * * * * * *

"Twenty-fifth. The gifts, legacies and devises made and bequeathed in and by the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth and Twenty-seventh articles of this my will are to be paid free of any inheritance, succession or other similar tax, and I hereby direct such tax to be borne by my estate.

"Twenty-sixth. If in the judgment of my executors, the survivors and survivor of them and his successors, the foregoing pecuniary legacies, trust and absolute, taken together shall exceed twenty per cent of so much of my estate as shall remain after the deduction of any and all inheritance, succession or any similar tax, and exclusive of the house and lot devised by the next article of this my will, it is my will that such pecuniary legacies shall ratably abate to such amount as will in the judgment of my executors, the survivors and survivor of them and his successors, taken together not exceed such twenty per cent.

"Twenty-eighth. All the rest, residue and remainder of my estate, both real and personal of which I may die seized and possessed and wherever situate or being, except as hereinbefore otherwise provided, including all lapsed legacies, I give, devise and bequeath to my trustees, the survivors and survivor of them and his successors, upon the following trusts, that is to say:

"1. To divide, set apart and hold the same in as many equal portions or shares as I shall leave daughters me surviving and the issue of a deceased daughter, allotting, however, and turning over to the issue of a deceased daughter only the portion or share which their parent would have taken if living, that is to say per stirpes and not per capita, and as to the share of a surviving daughter, to invest and

keep invested the personal estate and proceeds of real estate
14 of such share, if sold, in such securities as by the Thirty-sixth article of this my will they are authorized to invest in.

"2. To collect and receive the rents, issues, interest and income of the portion or share so to be set apart for each of my said daughters and to apply the same to her use so long as she shall live free from any control of her husband.

"3. Upon the death of such daughter leaving issue her surviving, to dispose of her share or portion among such issue in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof among such issue in shares per stirpes and not per capita, and if she shall leave no issue her surviving to continue to hold her share or portion for the benefit of her sister, if living, for life, in trust to collect and receive the rents, issues, interest and income thereof, and to apply the same to her use so long as she shall live, and upon or in case of her death, to divide the same to and among her issue, if any, in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof among such issue, in shares per stirpes and not per capita, and in default of such issue to divide the same to and among the following persons in the proportions herein provided, that is to say:

"To my nephew Lewis S. Wolff one half thereof, and the remaining one-half to divide into seven equal shares and to pay over the same as follows:

"One to my sister Babette Myer; one to my sister Athalie Frank; one to my sister Lottie Elson; one to and among the issue of my deceased sister Rosalie Keller, in shares per stirpes and not per capita; one to and among the issue of my deceased sister Fannie Steinam, in shares per stirpes and not per capita; one to and among the issue of my deceased sister Johanna Frank, in shares per stirpes and not per capita, and one to and among the issue of my deceased sister Caroline Frank, in shares per stirpes and not per capita, the shares so payable to my nephew Lewis S. Wolff and to my sisters
15 Babette Myer, Athalie Frank and Lottie Elson respectively, in case of their death to be paid to their issue respectively in shares per stirpes and not per capita. Should this provision of my will take effect, I direct that the trusts and provisions hereinbefore created by articles Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second and Twenty-fourth, so far as they shall then be in force, shall thereupon cease and determine and the principal of the trust fund shall form part of my estate for the purpose of the division herein provided. In case there be no person or persons to take either of the said shares, the share or shares as to which there shall be no person to take shall be divided among and be added to the shares of the others in the proportion hereinbefore stated.

"4. All the provisions of this my will are upon the condition and proviso that if for any reason the trust in favor of a surviving

daughter or descendant shall prove to be in whole or in part in the violation of law, then in such case she or he shall take absolutely what is provided to be in trust for her or his benefit so far as, and only so far as, the trust shall not be permitted by law.

"5. The foregoing provisions are upon the further condition and proviso that so far as concerns the share in my residuary estate which under the foregoing provisions would go to either of the descendants of a daughter, the same shall, so far as the law will permit, remain with the trustees, the survivors and survivor of them and his successors during the life of such descendant in trust, to invest and keep the same invested, to collect and receive the rents, issues, interest and income thereof, and to apply the same to the use of such descendant for and during his or her life, and upon his or her death, leaving issue surviving, to dispose of the same among such issue in shares as he or she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, such share shall go among such issue in shares per stirpes and not per capita, and in default of such issue such share shall go one-half of the total amount thereof to the husband or wife of any such descendant him or her surviving, if any, and the residue, and in case there shall be no husband or wife surviving, the whole shall go to and be divided among the persons who by the laws of New York would take, and in the shares in which they would take the same had such descendants died possessed thereof intestate.

"Thirty-seventh. As to all the trust provisions of my will I provide that under no circumstances shall any beneficiary be permitted to anticipate the income coming to him or her, or to make any disposition thereof prior to its receipt."

V.

Sections 72, 73, 75 and 77 of the Orphans' Court Act of the Statutes of New Jersey were in force at the time of the decease of the said Abraham Wolff, and thereafter until July 1, 1902, and for a considerable period after said date, which sections were as follows:

Section 72. "Where estate is settled and surplus remains, creditors who neglected to file claims may present same; payment; demand of establishment.—In all cases where any executor or administrator shall have settled the estate of any decedent, or may hereafter settle the estate of any decedent, and there has been, or shall be, upon such settlement a surplus to be distributed, it shall and may be lawful for any creditor of any estate, who may have neglected to file his claim with such executor or administrator within the time herein prescribed, to present such claim to such executor or administrator under oath at any time before said surplus shall have been distributed or paid over according to law by such executor or administrator, and upon such claim being so presented, it shall be the duty of such executor or administrator to pay the same, or so much thereof as there may be surplus in his hands for that purpose, in case he is

satisfied that it is correct and ought to be paid, or, if he is not satisfied of the correctness of such claim, he shall notify such
17 creditor to proceed forthwith to establish said claim by the judgment of some court of competent jurisdiction, and in such case the said executor or administrator shall not make any distribution or payment of such surplus money to or among the devisees or next of kin of said deceased without retaining in his hands a sum sufficient to pay the amount of such claim so presented by such creditor, with interest and costs, in case it shall be established by the judgment of a court, until such creditor shall have an opportunity to establish the validity of said claim by the judgment of some competent court."

Section 73. "Where estate is settled and surplus remains creditors who neglected to file claims may present same; suit by creditor on neglect to pay.—If such executor or administrator shall neglect or refuse to pay such claim upon being presented in manner aforesaid, it shall and may be lawful for such creditor to bring suit against such executor or administrator, for the recovery of said claim, in any court of competent jurisdiction, and the same proceedings may be had for the collection and recovery of said claim as if the same had been duly presented, before the settlement of said estate, within the time herein prescribed.

Section 75. "Actions against executor or administrator as to personal estate or for waste not affected.—Nothing herein contained shall prevent or bar any person from bringing and maintaining any action against an executor or administrator for or in respect of the personal estate of his testator or intestate, or for or in respect of any waste or misapplication thereof by such executor or administrator."

Section 77. "Legacy or distributive share not attached or paid to be assets for payment of debts.—Any legacy or distributive share which shall not have been attached in the hands of the executor or administrator, or paid over to the person, entitled to the same shall, notwithstanding such decree in bar of creditors, be assets in the
18 hands of the executor or administrator for the payment of a ratable proportion of the debt or claim of any creditor who shall not have presented the same within the time limited; but such creditor in any action to charge such assets shall not recover any costs, and if judgment pass against him in such action, he shall pay costs."

VI.

The said Abraham Wolff, deceased, left him surviving, his daughters Addie W. Kahn and Clara W. Wertheim, who were the legatees designated in the second paragraph and in subdivisions 1 and 2 of the twenty-eighth paragraph of his said last will and testament, and also left him surviving the legatees named in the other portions of his said last will and testament set forth in paragraph IV hereof. The estate of the said decedent was administered by the said executors in all respects subject to and in accordance with the laws

of New Jersey, and diligently and with all due and proper expedition and without any unnecessary or avoidable delay, but owing to the conditions necessarily controlling the said administration was not completed, and could not have been completed, on or before July 1, 1902, nor until some time thereafter.

None of the trust-funds provided for by said last will and testament was paid to the trustees or set apart or established on or before July 1, 1902, nor on or before said date was any payment out of or on account of any said trust funds or the income thereof, made to or for the benefit of any of said legatees.

Prior to July 1, 1902, advances were made to the said Addie W. Kahn, by reason of her interest in the residuary estate of the said decedent, the aggregate of all said advances being $330,763.31.

Prior to July 1, 1902, advances were made to the said Clara P. Wertheim, by reason of her interest in the residuary estate
19 of the said decedent, the aggregate of said advances being $330,763.32.

The legacy to Edward S. Steinam, provided by the fourth paragraph of the said last will and testament was satisfied prior to July 1, 1902.

The legacy to Louis Keller, provided by the said fourth paragraph, was satisfied prior to July 1, 1902.

The legacy to Louis Elson provided by the said fourth paragraph was satisfied prior to July 1, 1902.

The legacy to Stanley L. Wolff provided by the twenty-fourth paragraph of the said last will and testament was satisfied prior to July 1, 1902.

The specific legacies to the two daughters of the said decedent (who were also the beneficiaries of the trusts provided to be established out of the residuary estate) provided by the second paragraph of the said last will and testament were satisfied prior to July 1, 1902, and the clear value of each of said specific legacies was $5,000.00.

With the exception of the legacies to the said Edward S. Steinham, Louis Keller, Louis Elson and Stanley L. Wolff and the specific legacies to the two daughters of the said decedent, satisfied as aforesaid prior to July 1, 1902, it was not possible, prior to said July 1, 1902, to ascertain the net or actual or clear value of any legacy provided in any portion of said last will and testament hereinbefore set forth or to any legatee herein named nor of all of said estate or of said residuary estate and no such net or actual or clear value was ascertained or determined on or prior to said July 1, 1902.

For the period from October 1, 1900, the date of the death of the said Abraham Wolff, deceased, to June 30, 1902, and thereafter, until the payment to the trustees of the said estate in the manner provided in said last will and testament of the trust-funds provided for by the sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, twentieth, twenty-first and twenty-second paragraphs of said last will
20 and testament, and the establishment of the trust-funds therein provided for, payments to the legatees named in said

paragraphs were made, as therein provided, as follows, that is to say:—

To Flora Wolff, at the rate of $120.00 per month, in accordance with the said sixth paragraph.

To Matilda Steinam, at the rate of $150.00 per month, in accordance with the said seventh paragraph.

To Nellie Morris, at the rate of $125.00 per month, in accordance with the said eighth paragraph.

To Louis S. Myer, at the rate of $65.00 per month, in accordance with the said ninth paragraph.

To Alfred E. Frank, at the rate of $65.00 per month, in accordance with the said tenth paragraph.

To Rosa Keifer, at the rate of $180.00 per month, in accordance with the said eleventh paragraph.

To Fannie Elson, at the rate of $150.00 per month, in accordance with the said twelfth paragraph.

To Babette Myer, at the rate of $150.00 per month, in accordance with the said thirteenth paragraph.

To Athalie Frank, at the rate of $250.00 per month, in accordance with said fourteenth paragraph.

To Fannie Phillips, at the rate of $160.00 per month, in accordance with said fourteenth paragraph.

To Carrie Rauch, at the rate of $160.00 per month, in accordance with the said fifteenth paragraph.

To Benjamin Frank, at the rate of $65.00 per month, in accordance with the said sixteenth paragraph.

To Tillie Lehrburver, at the rate of $160.00 per month, in accordance with the said seventeenth paragraph.

To Lottie Elson, at the rate of $375.00 per month, in accordance with the said twentieth paragraph.

To Nanette Jacobs, at the rate of $125.00 per month, in accordance with the said twenty-first paragraph.

To Celia Loeb, at the rate of $125.00 per month, in accordance with the said twenty-second paragraph.

Except as stated in this paragraph no legacy provided by
21 any of the paragraphs of said last will and testament hereinbefore set forth, was satisfied in whole or in part on or before July 1, 1902.

VII.

On or about October 26, 1903, Herman C. H. Herold, who was then the United States Collector of Internal Revenue for the Fifth District of New Jersey, represented to the said executors that a tax in accordance with Section 29 of the Act of Congress of June 13, 1898, and amendments, in the sum of One Hundred and Seven Thousand, Three Hundred and Ninety-eight and 16/100 Dollars ($107,398.16) had been assessed and imposed upon legacies passing under the said decedent's said last will and testament, the payment of which was thereupon demanded of your petitioners by the said Herold, and your petitioners, on or about November 4, 1903, paid

to said Herold the said sum of One Hundred and Seven Thousand, Three Hundred and Ninety-Eight and 16/100 Dollars ($107,398.16), the whole of which was thereafter turned over and paid to the United States in the ordinary course of his business as Collector, as aforesaid.

VIII.

On or about April 4, 1904, your petitioners, made application for the refund of Twenty-six Thousand, Six Hundred and Thirty-seven and 59/100 Dollars ($26,637.59), of the One Hundred and Seven Thousand, Three Hundred and Ninety-eight and 16/100 Dollars ($107,398.16) paid as aforesaid, and on or about April 11, 1905, the Commissioner of Internal Revenue allowed said claim in the sum of Thirteen Thousand, Nine Hundred and Eighty-three and 36/100 Dollars ($13,983.36), which was subsequently repaid to petitioners.

On or about May 15, 1905, petitioners made application for the refund of Thirty-Seven Thousand, Six Hundred and Seventy-
22 three and 13/100 Dollars ($37,673.13) of the One Hundred and Seven Thousand, Three Hundred and Ninety-eight and 16/100 Dollars ($107,398.16) paid as aforesaid on account of the portion thereof represented to have been assessed with respect of the legacy to the said Clara W. Wertheim, who had died prior to the date of said assessment, which application was disallowed by the Commissioner of Internal Revenue. Thereafter, on or about November 2, 1905, petitioners commenced an action in the Supreme Court of the State of New Jersey against Herman C. H. Herold, the said Collector of Internal Revenue for the Fifth District of New Jersey, for the recovery of the said sum of Thirty-Seven Thousand, Six Hundred and Seventy-three and 13/100 Dollars ($37,673.13), with interest; on or about November 22, 1905, said action was removed to the United States Circuit Court for the District of New Jersey, by which Court, on or about December 11, 1906, judgment was entered for petitioners against said Herold for the principal sum of Thirty-three Thousand Seven Hundred and Three and 19/100 Dollars ($33,703.19), as taxes erroneously collected with respect to the legacy to the said Clara W. Wertheim, together with interest on said principal sum from the time of the payment thereof (Kahn v. Herold, 147 Fed., 575). Said judgment was affirmed by the United States Circuit Court of Appeals for the Third Circuit (Herold v. Kahn, 159 Fed. 608), and was thereafter paid by the United States.

IX.

On or about November 22, 1915, petitioners, pursuant to law and the regulations of the Treasury Department, made claim for the refund to them of the remaining Fifty-nine Thousand, Seven Hundred and Eleven and 61/100 Dollars ($59,711.61) of the One Hun-

dred and Seven Thousand, Three Hundred and Ninety-eight
23 and 16/100 Dollars ($107,398.16) paid as aforesaid, which claim was thereafter denied and rejected on or about August 14, 1916, the grounds for rejection being stated as follows:

"On July 1, 1902, the legal period of administration under New Jersey law had expired, and the failure of the executors to distribute the estate prior to that date was not due to any contingency whatever postponing such distribution. The tax having been assessed at the proper rates was therefore legally due."

X.

Your petitioners are advised by counsel and therefore aver:

1. That the only interests of taxable amount passing from the estate of the said decedent which absolutely vested in the possession or enjoyment of the legatees prior to July 1, 1902, were the interests of Edward L. Steinam, Louis Keller and Louis Elson, provided by the fourth paragraph of the said last will and testament, and the interest of Stanley L. Wolff, provided by the twenty-fourth paragraph thereof, and that the total amount of the tax collected in respect of these interests was Eight Hundred and Twenty-five and 75/100 Dollars ($825.75).

2. That, in addition to the interests referred to in the paragraph next foregoing, the only interests passing from the estate of the said decedent which absolutely vested in the possession or enjoyment of the legatees prior to July 1, 1902, were the interests of the two daughters of the said decedent, provided by the second paragraph of the said last will and testament, which said interests had the actual and clear value of Five Thousand Dollars ($5,000.00) each, and that the total tax collected in respect to both these interests was Two Hundred and Twenty-five Dollars ($225.00).

3. That, except as stated in the two paragraphs, next foregoing, all the interests in respect of which the said sum of One Hundred and Seven Thousand, Three Hundred and Ninety-eight and
24 16/100 Dollars ($107,398.16) was demanded and collected, as aforesaid, were, on July 1, 1902, within the meaning of the Act of Congress of June 27, 1902, contingent beneficial interests which had not absolutely vested in possession or enjoyment.

4. That, if the United States were entitled to the payment of any tax with respect to the interests in the residuary estate passing to the said Addie P. Kahn and the said Clara P. Wertheim, it is at least true that said interests were contingent beneficial interests which did not vest in possession or enjoyment prior to July 1, 1902, except as to the sums actually advanced on account of said interests prior to said date.

XI.

Wherefore, your petitioners aver that the whole of the said sum of One Hundred and Seven Thousand, Three Hundred and Ninety-eight and 16/100 Dollars ($107,398.16) demanded and paid as aforesaid, except Eight Hundred and Twenty-five and 75/100 Dollars ($825.75) demanded and paid as described in sub-division 1 of paragraph X hereof, that is to say, the sum of One Hundred and Six Thousand, Five Hundred and Seventy-two and 41/100 Dollars ($106,572.41) was collected in respect of contingent beneficial interests not absolutely vested in possession or enjoyment prior to July 1, 1902, and that there is now justly owing to them by the defendants, the sum of Fifty-eight Thousand, Eight Hundred and Eighty-five and 86/100 Dollars ($58,885.86), after deducting all just setoffs and demands upon the part of the United States, which said sum of Fifty-eight Thousand, Eight Hundred and Eighty-five Dollars 86/100 ($58,885.86) the said Commissioner of Internal Revenue and the Secretary of the Treasury have refused, and continue to refuse, to refund and pay to petitioners.

And your petitioners further aver that they are the sole
25 owners of the claim herein sued upon and that no transfer or assignment of said claim, or any part thereof or interest therein, has ever been made; that they are citizens of the United States, that the said Otto H. Kahn is a citizen of the State of New Jersey and the said Henri P. Wertheim van Henkelom is a citizen of the State of New York; that they have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States, and that they believe the averments in this petition to be true.

Prayers.

The premises considered, petitioners pray:

1. That this Honorable Court will render judgment against the United States for the said sum of Fifty-eight Thousand, Eight Hundred and Eighty-five and 86/100 Dollars ($58,885.86) in favor of petitioners.

2. That Petitioners may have such other and further relief as the nature of the case may require and to this Honorable Court may seem meet and proper.

H. T. NEWCOMB,
Attorney for Petitioners.

CHARLES F. KINCHELOE,
Of Counsel.

26 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a Notary Public in and for the District of Columbia, H. T. Newcomb, who, being duly sworn according to law, deposes and says that he has been duly authorized, by power of attorney filed herewith, to verify the claimants' petition in this cause, that he has read and understands the foregoing petition, and that the matters and facts therein set forth are true in substance and in fact, as he is informed and believes.

H. T. NEWCOMB.

Subscribed and sworn to before me this 30th day of June, 1917.

[SEAL.] ETHEL D. PITNEY,
Notary Public.

27 "EXHIBIT A."

In the Name of God, Amen:

I, Abraham Wolff, of the City of New York, do make, publish and declare this to be my last will and testament, in manner following, that is to say:

First. I direct my executors to pay all my just debts and funeral expenses; my funeral and the monument to be erected over my grave I desire to be of a plain and unostentatious character.

Second. I confirm the conveyance to my daughter Clara of the house in which I reside No. 33 West Fifty-seventh Street in the City of New York, by deed dated January third, 1896. I also confirm to her the gift of the contents of the house. The gift includes all the household furniture and goods of every kind, silverware, pictures, bronzes and other works of art and articles of use and ornament which the house contains. The house with all its contents is to be charged to my daughter Clara at One hundred and fifty thousand dollars against the advance of Two hundred thousand dollars which I have credited to her upon my books.

I confirm the advance of Two hundred thousand dollars which I have heretofore made to my daughter Addie.

I give and bequeath to my daughters, and the survivor of them, all my horses, carriages, sleighs, harnesses and stable equipment and appurtenances, to be divided between them if both survive in such manner as they may determine themselves. If they do not agree the division shall be made by my executors.

Third. If at the time of my decease I shall be the owner of any bonds of the Hebrew Benevolent and Orphan Asylum Society of the city of New York, I direct my executors to return and surrender the same to the said society to be cancelled or otherwise disposed of by it in its discretion, and I give and bequeath to the said society Five thousand dollars cash.

I give and bequeath to the Home for Aged and Infirm Hebrews of the City of New York, Five thousand dollars, with which if the

amount shall be sufficient, I would be pleased to have a bed or beds endowed in perpetuity in memory of my deceased wife, Lydia Wolff and myself,—this is not obligatory; to the Mount Sinai Hospital in the City of New York Ten thousand dollars with which if the amount shall be sufficient I would be pleased to have a bed or beds endowed in perpetuity in memory of my deceased wife Lydia
28 Wolff and myself,—this is not obligatory; to the Montefiore Home for Chronic Invalids Ten thousand dollars, with which if the amount shall be sufficient, I would be pleased to have a bed or beds endowed in perpetuity in memory of my deceased wife Lydia Wolff and myself,—this is not obligatory; to the Society for the Prevention of Cruelty to Children, One thousand dollars; to the Colored Orphan Asylum, One thousand dollars; to the Hebrew Technical Institute of the City of New York, Two thousand five hundred dollars; to the Educational Alliance in the City of New York, Three thousand dollars; to the German Hospital in the City of New York, One thousand dollars; to the Hebrew Infant Asylum, One thousand dollars; to the Children's Aid Society, One thousand dollars; to the Five Points House of Industry, One thousand dollars; to the American Female Guardian Society, One thousand dollars; to the New York Cancer Hospital, whose name has been recently changed to General Memorial Hospital for the Treatment of Cancer and Allied Diseases, Five thousand dollars, with which, if the amount shall be sufficient, I would be pleased to have a bed or beds endowed in perpetuity in memory of my deceased wife Lydia Wolff and myself,—this is not obligatory; to the United Hebrew Charities of the City of New York a sum equal to the amount which on my decease may be paid to my estate or to my children by the Lebanon Lodge of the Independent Order of B'Nai Brith, and also the further sum of Ten thousand dollars; to the Edenkoben Hospital, meaning thereby the Hospital at Edenkoben, in Germany, whatever its name may be, Two thousand five hundred dollars; to the Cypress Hills Cemetery Association Twenty-five hundred dollars, as a permanent fund, the income to be used for keeping in order the burial plots in which are interred the remains of my wife and other members of my family; and to the authorities having charge of the Hebrew Cemetery or graveyard at Worms, in Germany, in which are interred the remains of my brother Samuel and niece Rosa Wolff, Fifteen hundred dollars, the same to be kept invested by the authorities and the income to be used for keeping such graves and their surroundings in order.

Fourth. I give and bequeath to the following, the following sums, that is to say:

To each daughter now living of my nephew Philip Frank, my niece Fanny Elson, my niece Fannie Phillips, my niece Rosa
29 Keifer, my niece Carrie Rauch, my niece Flora Wolff, my niece Nellie Morris, my nephew Louis Meyer, my niece Nannette Jacobs and my niece Celia Loeb, who shall be unmarried at the time of my death, Five thousand dollars; provided that if at the time of my death such daughters shall not have reached twenty-three years of age, such legacy shall only be payable if and when

she shall marry or reach that age, whichever event shall first occur, with the right and power, however, to my executors, the survivors and survivor of them and his successors, in their or his discretion, to pay her the whole or any part of such amount in anticipation of her marriage to enable her to make preparation therefor; and provided further that if my niece or nephew, the mother or father of such daughter shall survive me but shall die before his or her said daughter shall be entitled to such Five thousand dollars, I direct that from his or her death, if he or she shall survive me, or should he or she die before me that from my death there shall be paid to his or her said daughter the income of such Five thousand dollars until she shall become entitled to the principal or until, according to the terms of the bequest, it shall lapse.

My executors, the survivors and survivor of them and his successors, may at any time in their and his absolute discretion, deposit either, any or all of the said legacies of Five thousand dollars with a trust company of the City of New York to be selected by them, and to be received and held by such trust company upon the terms of the bequest thereof, which deposit shall be a discharge to my executors; the bequest, in the event that it shall lapse, to form part of my residuary estate and to be payable to the trustees thereof.

To my niece Rosa Keifer the policy of life insurance by the Michigan Mutual Life Insurance Company of Detroit for Five thousand dollars on the life of her husband Louis Keifer, if I shall hold the same at the time of my death.

To my niece Rachel Kaufmann, and in the event of her death before me leaving issue me surviving, to and among such issue in shares per stirpes and not per capita, Five thousand dollars.

To my nephew Philip Frank Five thousand dollars.

To my nephew Edward S. Steinam Fifteen thousand dollars.

To my nephew Louis Keller Fifteen thousand dollars.

To my nephew Louis Elson Fifteen thousand dollars.

My reason for not bequeathing any legacy to my niece Mary Strauss is because on her marriage I gave to her a sum equal to the legacy I intended to make to her in my will, and also because of the provision for her in the Twenty-seventh article of this will.

My reason for bequeathing to my niece Rachel Kaufmann and my nephew Philip Frank and any other niece or nephew a sum less than I have bequeathed to other nieces and nephews is because I consider them to be in better pecuniary circumstances.

Fifth. I give and bequeath to each clerk of my firm of Kuhn, Loeb & Co. who shall be in the service of the firm at the time of my death and who shall have been in its service for the preceding ten years continuously, one thousand dollars; to each clerk who shall be in the service of the firm at the time of my death and who shall have been in its service less than ten and over five years continuously, Five hundred dollars; to each clerk who shall be in the service of the firm at the time of my death and who shall have been in its service less than five but over three years continuously, Two hundred and fifty dollars; and to each clerk who shall be in the service

of the firm at the time of my death and who shall have been in its service less than three years One hundred and fifty dollars.

Sixth. I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Flora Wolff for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided, and until my said trustees shall receive the aforesaid principal sum I do hereby direct my executors to pay out of the income of my estate to my niece Flora Wolff, the sum of One hundred and twenty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Seventh. I give and bequeath to my trustees, their survivors and successors, Fifty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are
31 by the Thirty-sixth article of this my will authorized to make investments in, and to pay the income and interest arising therefrom to my niece, Matilda Steinam for and during her life, and upon her death I direct that the same be added to and form part of my residuary estate to be disposed of as hereinafter provided, and until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my niece Matilda Steinam, the sum of One hundred and fifty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Eighth. I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Nellie Morris for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Nellie Morris, the sum of One hundred and twenty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Ninth: I give and bequeath to my trustees, their survivors and successors, the sum of Twenty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom

to my nephew Louis S. Myer, for and during his life, and upon his death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said nephew Louis S. Myer, the sum of Sixty-five dollars a month. The foregoing provision is, however, subject to the
32 provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Tenth: I give and bequeath to my trustees, their survivors and successors, Twenty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my nephew Alfred E. Frank for and during his life, and upon his death I direct that the same shall be added to and form part of my residuary estate to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said nephew Alfred E. Frank the sum of Sixty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Eleventh: I give and bequeath to my trustees, their survivors and successors, the sum of Sixty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Rosa Keifer for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Rosa Keifer, the sum of One hundred and eighty dollars a month. The foregoing bequest is, however, upon the condition that so much of the income of the said trust as shall be necessary for the purpose, shall be applied by my trustees to the payment of the premiums on the policy of life insurance by the Michigan Mutual Life Insurance Company of Detroit, for Five thousand dollars on the life of Louis Keifer, which I now hold, if and so long as it shall be held by my estate after my death. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Twelfth: I give and bequeath to my trustees, their survivors and successors, Fifty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by
33 the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Fannie Elson for and during her life, and

upon her death I direct that the same shall be added to and form part of my residuary estate to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum I do hereby direct my executors to pay out of the income of my estate to my said niece Fannie Elson the sum of One hundred and fifty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Thirteenth: I give and bequeath to my Trustees, their survivors and successors, Fifty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my sister Babette Myer for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum I hereby direct my executors to pay out of the income of my estate to my sister Babette Myer the sum of One hundred and fifty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Fourteenth: I give and bequeath to my trustees, their survivors and successors, Eighty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my sister Athalie Frank for and during her life, and upon or in case of her death to hold Sixty thousand dollars, that is to say six-eighths of such Eighty thousand dollars, in trust if Fannie Phillips, the daughter of my said sister Athalie Frank, shall be living, to invest and keep invested the same in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to the said Fannie Phillips for and during her life, and upon
34 her death I direct that the same shall be added to and form part of my residuary estate to be disposed of as hereinafter provided, and the remaining Twenty thousand dollars, that is to say the remaining two-eighths of the said sum of Eighty thousand dollars, shall upon the death of my said sister Athalie Frank be added to and form part of my residuary estate to be disposed of as hereinafter provided, but if my said sister Athalie Frank shall survive her said daughter Fannie Phillips then upon the death of my said sister the entire amount of the said principal sum of Eighty thousand dollars herein set apart for her benefit shall be added to and form part of my residuary estate to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said sister Athalie Frank the sum of Two hundred and fifty dollars a month. If my sister Athalie Frank shall die before

me, and her daughter, the said Fannie Phillips, shall survive me, then and in such a case and until my said trustees shall receive the aforesaid principal sum of Sixty thousand dollars, I do hereby direct my executors to pay out of the income of my estate to my niece the said Fannie Phillips, the sum of One hundred and sixty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Fifteenth: I give and bequeath to my trustees, their survivors and successors, Sixty thousand dollars in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Carrie Rauch, for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustee shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Carrie Rauch the sum of One hundred and Sixty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Sixteenth: I give and bequeath to my trustees, their sur-
35 vivors and successors, Twenty thousand dollars, in trust however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my nephew Benjamin Frank, for and during his life, and upon his death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said nephew Benjamin Frank the sum of Sixty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Seventeenth: I give and bequeath to my trustees, their survivors and successors, Sixty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Tillie Lehrburger for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Tillie Lehrburger, the sum of One hundred and sixty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Eighteenth: I give and bequeath to my trustees, their survivors and successors, Twenty-five thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-ninth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my brother-in-law Simon Steinam, for and during his life; and upon his death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of
36 my estate to my said brother-in-law Simon Steinam, the sum of Seventy-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Nineteenth: I give and bequeath to my trustees, their survivors and successors, Thirty-five thousand dollars in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my nephew Louis S. Steinam for and during his life, and upon his death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said nephew Louis S. Steinam, the sum of One hundred dollars a month. And it is my will and I do hereby direct that the right of said nephew to receive the said interest or income shall cease before his death whenever he shall in the sole and exclusive judgment of my said trustees, be in such state of health as to enable him to work for his own support, and upon the happening of such an event my said trustees are forthwith to pay out of the said principal the sum of Five thousand dollars to my said nephew, and to divide and pay ove the balance of said principal as they are directed to do upon the death of my said nephew. The foregoing provision is all subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Twentieth: I give and bequeath to my trustees, their survivors and successors, One hundred thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my sister Lottie Elson for and during her life, and the income and interest of Forty thousand dollars thereof after her death to her husband Julius Elson during his life, should he survive her, and upon her death I direct that the Sixty thousand dollars of the principal, and if she shall survive her husband the whole of the principal, and upon his death, he surviving her, the Forty thousand dollars of the principal shall be added to and form part of my residuary estate, to

be disposed of as hereinafter provided. And until my said
37 trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my sister Lottie Elson the sum of Three hundred and seventy-five dollars a month, if living, and if not I direct them to pay out of the income of my estate to Julius Elson, the husband of my sister Lottie Elson, One hundred and twenty-five dollars a month until my said trustees shall receive the said Forty thousand dollars. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Twenty-first: I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Nanette Jacobs for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided and until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Nanette Jacobs, the sum of One hundred and twenty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Twenty-second: I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Celia Loeb for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my executors to pay out of the income of my estate to my said niece Celia Loeb, the sum of One hundred and twenty-five dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article.

Twenty-third: I give and bequeath to my trustees, their
38 survivors and successors, Fifteen thousand dollars, in trust, however, to invest and keep the same invested in such securities as my said trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to Agnes Kunath, formerly the governess of my daughters, for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided. And until my said trustees shall receive the aforesaid principal sum, I do hereby direct my

executors to pay out of the income of my estate to the said Agnes Kunath the sum of Forty-five dollars a month.

Twenty-fourth: I give and bequeath to my grand-nephew, Stanley L. Wolff, son of my nephew Lewis S. Wolff, the watch worn by me at the time of my death and Ten thousand dollars, such Ten thousand dollars to be paid to him on his reaching his twenty-first birthday, if he shall live so long, and if at the time of my death he shall not yet have reached that age.

I give and bequeath to my grandniece Dorothy Sybil, daughter of my nephew Lewis S. Wolff, Ten thousand dollars, to be paid to her on her marriage, or on her reaching twenty-one years of age, whichever event shall first occur, if she shall not have married or reached that age at the time of my death.

I give and bequeath to my sister-in-law, Mrs. Dorothea Wolff, Ten thousand dollars, to be retained by herself, or to be used by her for division among persons whom she may think I would like to remember, just as she pleases. This is an absolute legacy to her, free from any trust, limitation or restriction.

Twenty-fifth: The gifts, legacies and devises made and bequeathed in and by the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth and Twenty-seventh articles of this my will are to be paid free of any inheritance, succession or other similar tax, and I hereby direct such tax to be borne by my estate.

Twenty-sixth: If in the judgment of my executors, the survivors and survivor of them and his successors, the foregoing pecuniary legacies, trust and absolute, taken together shall exceed twenty
39 per cent of so much of my estate as shall remain after the deduction of any and all inheritance, succession or any similar tax, and exclusive of the house and lot devised by the next article of this my will, it is my will that such pecuniary legacies shall ratably abate to such amount as will in the judgment of my executors, the survivors and survivor of them and his successors, taken together not exceed such twenty per cent.

Twenty-seventh: In case I die seized of the house and lot known as No. 47 West Ninety-first street, in the City of New York, then and in that event I give and devise the said house and lot to my sister Lottie Elson for and during her life; and upon or in case of her death I give and devise the same to my niece Mary Strauss for and during her life. I authorize and empower my executors to sell said house and lot, at the request of my said sister and niece, or their survivor, and with the proceeds of such sale to purchase, by like request, another house and lot, in which substituted house and lot my said sister and niece shall have the same tenancy for life as in the house and lot so sold, or in the absence of such request for the purchase of another house and lot, to invest the proceeds arising on such sale in such

securities as my trustees hereinafter named are authorized by this my will to invest my residuary estate, and to pay the income or interest arising therefrom to my said sister during her life, and upon or in case of her death to my said niece for and during her life. And I hereby authorize and empower the survivor of my said sister and niece to dispose by last will and testament of said house and lot 47 West Ninety-first street, or of any substituted house and lot so to be purchased, or of the proceeds of the sale of said house and lot so to be invested as aforesaid, and in default of such disposition by said survivor, then, and upon her death, I give, devise and bequeath the said house and lot or the substitute, or the proceeds of the sale of said house and lot so to be invested as aforesaid, to the heirs at law or next of kin, as the case may be, of the said survivor, to be divided among them in the proportions provided by law. The provisions contained in this article of my will in favor of my said sister are in addition to those hereinbefore made in her favor.

Twenty-eighth: All the rest, residue and remainder of my estate, both real and personal, of which I may die seized and possessed and wherever situate or being, except as hereinbefore otherwise provided, including all lapsed legacies, I give, devise and bequeath to my trustees, the survivors and survivor of them and his successors, upon the following trust, that is to say:

1. To divide, set apart and hold the same in as many equal portions or shares as I shall leave daughters me surviving and the issue of a deceased daughter, allotting, however, and turning over to the issue of a deceased daughter only the portion or share which their parent would have taken if living, that is to say per stirpes and not per capita, and as to the share of a surviving daughter, to invest and keep invested the personal estate and proceeds of real estate of such share, if sold, in such securities as by the Thirty-sixth article of this my will they are authorized to invest in.

2. To collect and receive the rents, issues, interest and income of the portion or share so to be set apart for each of my said daughters and to apply the same to her use so long as she shall live free from any control of her husband.

3. Upon the death of such daughter leaving issue her surviving, to dispose of her share or portion among such issue in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof among such issue and shares per stirpes and not per capita, and if she shall leave no issue her surviving, to continue to hold her share or portion for the benefit of her sister, if living, for life, in trust to collect and receive the rents, issues, interest and income thereof, and to apply the same to her use so long as she shall live, and upon or in case of her death, to divide the same to and among her issue, if any, in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof

among such issue, in shares per stirpes and not per capita, and in default of such issue to divide the same to and among the following persons in the proportions herein provided, that is to say:

To my nephew Lewis S. Wolff one-half thereof, and the remaining one-half to divide into seven equal shares and to pay over the same as follows:

One to my sister Babette Myer; one to my sister Athalie Frank; one to my sister Lottie Elson; one to and among the issue of my deceased sister Rosalie Keller, in shares per stirpes and not per capita; one to and among the issue of my deceased sister Fannie Steinam, in shares per stirpes and not per capita; one to and among the issue of my deceased sister Johanna Frank, in shares per stirpes and
41 not per capita, and one to and among the issue of my deceased sister Caroline Frank, in shares per stirpes and not per capita, the shares so payable to my nephew Lewis S. Wolff and to my sisters Babette Myer, Athalie Frank and Lottie Elson respectively, in case of their death to be paid to their issue respectively in shares per stirpes and not per capita. Should this provision of my will take effect, I direct that the trusts and provisions hereinbefore created by articles Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second and Twenty-fourth, so far as they shall then be in force, shall thereupon cease and determine and the principal of the trust fund shall form part of my estate for the purpose of the division herein provided. In case there be no person or persons to take either of the said shares, the share or shares as to which there shall be no person to take shall be divided among and be added to the shares of the others in the proportion hereinbefore stated.

4. All the provisions of this my will are upon the condition and proviso that if for any reason the trust in favor of a surviving daughter or descendant shall prove to be in whole or in part in the violation of law, then in such case she or he shall take absolutely what is provided to be in trust for her or his benefit so far as, and only so far as, the trust shall not be permitted by law.

5. The foregoing provisions are upon the further condition and proviso that so far as concerns the share in my residuary estate which under the foregoing provisions would go to either of the descendants of a daughter, the same shall, so far as the law permit, remain with the trustees, the survivors and survivor of them and his successors during the life of such descendant in trust, to invest and keep the same invested, to collect and receive the rents, issues, interests and income thereof, and to apply the same to the use of such descendant for and during his or her life, and upon his or her death, leaving issue surviving, to dispose of the same among such issues and shares as he or she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, such share shall go among such issue in shares per stirpes and not per capita, and in default of such issue such share shall go one-half of the total amount

thereof to the husband or wife of any such descendant him
42 or her surviving, if any, and the residue, and in case there shall be no husband or wife surviving, the whole shall go to and be divided among the persons who by the laws of New York would take, and in the shares in which they would take the same had such descendants died possessed thereof intestate.

Twenty-ninth: Any amounts additional to the two hundred thousand dollars mentioned in the Second article of this my will which upon my books shall appear to the credit of my daughter Clara and her husband Henry P. Wertheim, either or both, or to the credit of my name in trust for either or both, I give and bequeath to the said Henri P. Wertheim, if living, if not, I direct that the same shall be added to and form part of the trust and provision for my daughter Clara and her issue created by the Twenty-eighth article of this my will.

Thirtieth: I do hereby authorize and direct my trustees, their survivors and successors, to pay to each of the sons of my said daughters respectively upon his reaching the age of twenty-three years, at his request and with the consent of his parent or parents if living, a sum not exceeding twenty per cent of the share of my estate to which as estimated by my trustees he will or will have become entitled upon the decease of his mother during his life, and upon like request and with like consent upon his reaching the age of thirty years to pay to him an additional sum which, together with the sum already paid him, shall not exceed forty per cent of his said share of my estate; these payments to be made out of the share or portion of my estate so to be set apart for his mother and to be charged to his share thereof.

I do hereby authorize and direct my trustees, their survivors and successors, out of the principal of the portion or share of my estate so to be set apart for my said daughters respectively at any time to pay to each of the daughters of such daughters respectively upon or in anticipation of her marriage, a sum not exceeding two hundred and fifty thousand dollars, at her request with the consent of her parent or parents if living, and if not, with the consent of her mother's sister and the husband of the latter, if living, and if neither be then living upon the sole request of such daughter of my daughters respectively.

Thirty-first: It is my hope that the capital of my residuary estate will be preserved for the benefit of my descendants. I am
43 aware that there are limitations upon the extent to which I can prevent the disposition of my estate. So far as concerns any part of the capital of my estate which shall come absolutely to either of my daughters or descendants, I request them respectively to place the same in trust upon the same terms and conditions as are herein contained. I am aware that this request is not a binding legal direction. I make it as a personal request to my daughters and descendants, and feel assured that they will carry out my wishes in this regard so far as they reasonably and lawfully can.

Thirty-second: I hereby authorize and empower my trustees, their survivors and successors, to sell any or all of my real estate herein devised to them or of which they may become trustees, whenever they mey deem it judicious so to do, either at public or private sale, and at such prices and upon such terms as they may deem best, and until such sale to lease the same, and upon every such sale the proceeds thereof are to be deemed and treated by my said trustees as forming a part of my residuary personal estate.

Thirty-third: Upon the sale of any of my real estate by my said trustees, their survivors and successors, they are hereby vested with full power to make and execute all proper and necessary deeds and conveyances, and in dividing any of my real estate devised to them, they and their survivors and successors are hereby empowered to partition the said real estate, or to cause the same to be partitioned by legal proceedings or by any other method they in their discretion may deem best.

Thirty-fourth: I hereby authorize and empower my executors to hold and to continue to hold in their discretion until they shall be discharged from their executorship by a court of competent jurisdiction, any investments of my personal estate existing at the time of my death, my intent hereby being that my executors shall be absolved and discharged from the absolute legal duty of converting all my personal estate into money, and that they shall not be liable for any shrinkage in value for not so doing.

Thirty-fifth: In the event of my death without leaving children me surviving, or the issues of any deceased child, then and in that event I cancel, annul and revoke all the foregoing devises, and bequests in articles Sixth, Seventh, Eighth, Ninth, Tenth,
44 Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second and Twenty-fourth of this my will, and I direct all my residuary estate, both real and personal, be sold and converted into money by my executors, their survivors and successors, and that the proceeds thereof be divided and distributed as follows, that is to say:

One-half thereof I give and bequeath to my nephew Lewis S. Wolff; the remaining one-half thereof I direct shall be divided into seven equal parts, one of which I give and bequeath to my sister Babette Myer, one to my sister Athalie Frank, one to my sister Lottie Elson, one to and among the issue of my deceased sister Rosalie Keller, in shares per stirpes and not per capita; one to and among the issue of my deceased sister Fannie Steinam, in shares per stripes and not per capita; one to and among the issue of my deceased sister Johanna Frank, in shares per stirpes and not per capita, and one to and among the issue of my deceased sister Caroline Frank, in shares per stirpes and not per capita. The shares left to my nephew Lewis S. Wolff and my sisters Babette Myer, Athalie Frank and Lottie Elson, in case of their death to go to their issue respectively in shares per stirpes and not per capita. And in case there be no person or

persons me surviving to take either of the said shares, the share or shares as to which there shall be no person or persons to take to be divided among and to be added to the shares of the others in the proportions hereinbefore stated.

Thirty-sixth: My trustees are hereby authorized and empowered from time to time, to sell the securities, either, any or all of which a trust fund shall consist, and to invest and keep invested all personal estate received by them under and in pursuance of this my will, as well as all proceeds of any real estate sold by them, in the following securities, that is to say:

1. My trustees are hereby authorized and empowered to retain and continue any investments of real or personal estate belonging to me at the time of my death, until they may deem it prudent and expedient to sell the same.

2. In securities in which savings banks or trustees in the State of New York may at the time lawfully invest any of their funds, except in mortgages or unimproved real estate.

3. In bonds secured by first mortgage on improved real estate in the cities of New York, Boroughs of Manhattan and Brooklyn, in the State of New York, Boston in the State of Massachusetts, Philadelphia in the State of Pennsylvania, Baltimore in the State of Maryland, and in the case of foreclosure of any such mortgages or of mortgages held under preceding clauses to purchase such real estate.

4. In bonds or stock of the United States, or of the several states of the United States which have not made public default in the payment of principal or interest upon their bonds or stocks within ten years immediately preceding the making of such investment.

5. In bonds or stocks of any of the incorporated cities in the United States having at least 40 thousand inhabitants, and which have not made public default in the payment of principal or interest upon their bonds or stocks within ten years immediately preceding the making of such investment.

6. In mortgage bonds of railway and other corporations in the United States which shall have regularly paid the interest upon all of the bonds of the same issue, and of all issues secured by prior lien for the period of five (5) consecutive years immediately preceding the making of such investment. This clause is, however, not intended to authorize the purchase of the bonds of any corporations other than railway corporations which during said period have not earned according to official statements in every one of the preceding five (5) years at least double the amount necessary to pay interest on all of the issue of the bonds to be purchased, and of any other issue having prior lien on the property.

In the case of a reorganized property, in calculating the net earnings of the company, the predecessor company and the new company shall be considered identical.

7. In full paid non-assessable capital stock of railway and of other corporations in the United States on which for at least five (5) consecutive years immediately preceding the date of the purchase dividends have been paid on all of the stock of the same class.

8. In bank stocks or in the stock of trust companies in the City of New York, Boroughs of Manhattan and Brooklyn, which are assessable only for an amount not in excess of the par value of such stock.

9. Provided, however, and it is my wish and direction that in the bonds of the United States not more than ten per cent of a trust fund shall be kept in any single investment; in the bonds or stocks
46 of the several States of the United States, and in the bonds or stocks of the City of New York, Boroughs of Manhattan and Brooklyn, not more than five per cent shall be kept in any single investment; in the bonds of any other cities in the United States not more than three per cent shall be kept in any single investment; in real estate mortgages not more than four per cent shall be kept in any single investment; in bonds of railway companies, or in stocks of banks or of trust companies in the City of New York, Boroughs of Manhattan and Brooklyn, not more than three per cent shall be kept in any single investment, and in stocks of railway corporations and in bonds and stocks of any other corporation (except municipal corporation and bank and trust companies, and except bonds of railway companies) not more than one per cent shall be kept in any single investment.

By single investment I mean the bonds or stocks of any single railway company or any other corporation; the bonds of the United States; the bonds or stocks of a state or incorporated city in the United States, or a mortgage upon a single piece of real estate.

10. Provided, further, that except as in clause 12 provided, not more than ten per cent of the trust fund shall be kept invested in stocks of railway companies and in bonds and stocks of corporations other than municipal corporations, not more than twenty per cent in municipal stocks or bonds, not more than one-half in railroad bonds, and not more than one-half in mortgages on real estate.

11. The foregoing provisions respecting the percentage of a trust fund which shall be kept in any single investment or the percentage which shall be kept in any class of investments are with the proviso that the trustees for the time being may at any time and from time to time invest a percentage of a trust fund larger than that hereinbefore prescribed in securities which at the time of such investment may by law be exempt in whole or in part from taxation.

12. In British Consuls, Imperial German Bonds, and in the bonds of the several states or cities in Germany, and of cities in Great Britain, in bonds of Sweden, Norway, Holland, Denmark, of the Swiss Federation, provided that not more than five per cent of any trust fund shall be invested in the bonds of any foreign government or

state, and not more than three per cent of any trust fund in the bonds of any foreign city, and provided further, that in no case
47 shall more than twenty-five per cent of the trust fund be invested in such foreign securities collectively.

13. My trustees are further authorized to use any portion of personal estate received by them under and in pursuance of this my will, or of the proceeds of any of my real estate sold by them for the purpose of improving any portion of my real estate or any real estate purchased by them as herein authorized in such manner as they may deem for the best interests of my estate.

14. I intend hereby expressly to authorize and empower my trustees, their survivors and successors, to invest and reinvest in their discretion in securities additional to those in which trustees would be authorized and permitted to make investments under the laws of the State of New York, provided such investments are of the character and to the extent above designated.

The principal of all investments, however, must be registered in the names of the trustees.

15. Should I own at the time of my death any securities the principal of which cannot be registered, I direct that the same be sold within one year of my death and the proceeds invested in registered securities of the character, and not exceeding the extent above designated.

Thirty-seventh: As to all the trust provisions of my will I provide that under no circumstances shall any beneficiary be permitted to anticipate the income coming to him or her, or to make any disposition thereof prior to its receipt.

Thirty-eighth: The land which I own in Morristown, in the State of New Jersey and which I have improved by the erection of houses as a country residence, and all other land and improvements which I shall add to such country residence, I direct to form part of the trust estate hereinbefore left in trust for the benefit of my daughters and their issue, one-half for each daughter and the issue of each respectively as hereinbefore provided, and I devise the same accordingly. In the event of the death of either of my daughters before me, I direct that such country residence shall form part of the trust estate left for the benefit of my other daughter, upon her written request to that effect. My trustees shall, at the written request of both of my daughters, if they survive me, and if only one shall survive me, then at her written request, lease such country residence from time to time, or sell the same, the proceeds in case of a sale, to belong to the trust estates, one-half to each. So long as
48 both my said daughters shall live, such country residence shall not be leased or sold without the written consent of each. In the event of the death of one of my daughters, either before or after me, such country residence shall not be leased or sold without the written consent of the survivor. Should either of my daughters die before or after me, my trustees shall, at the written request of the

survivor, convey such country residence absolutely to her, for a sum which shall be seventy-five per cent. of the value of such country residence according to the judgment of my trustees, and the principal shall be paid by a deduction of the amount from the trust residuary share in my estate of such daughter; the amount of such principal shall for purposes of division, be treated as a payment to my trust residuary estate, one-half for each trust estate.

Thirty-ninth: I hereby nominate and appoint my friends Solomon Loeb, Jacob Schiff and Louis A. Heinsheimer, my nephew Lewis S. Wolff, my sons-in-law Otto H. Kahn and Henri P. Wertheim, and my friend Felix M. Warburg to be the executors of this my will.

No bonds or security of any kind shall be required of them. So far as I have the power to do so, I direct that they and each of them may qualify as executors any and everywhere without bonds or security.

I hereby authorize and empower my executors, the survivors and survivor of them and his successors, to sell and dispose of all of my real estate mentioned and referred to in the Thirty-fifth article of this my will, in case such article takes effect, either at public or private sale, and for such prices and upon such terms as to them may seem best, and to execute and deliver the proper deeds for the conveyance thereof and until such sale to collect and receive the rents, issues, income and interest thereof and to add the same to the proceeds of the real estate when sold. I request my said executors, and their survivors or survivor to take a general supervisory care and interest in the affairs of all the members of my family mentioned in this my will.

Fortieth: I hereby nominate and appoint my nephew Lewis S. Wolff, my friends Jacob H. Schiff, Louis A. Heinsheimer and Felix M. Warburg and my brother-in-law Louis Josephthal and my sons-in-law Otto H. Kahn and Henri P. Wertheim, trustees of and under this my will, except as to the trust created by and provided for in the Twenty-seventh article of this my will. Any trustee may
49 by an instrument under his hand and seal resign. Should the number of trustees of any part of my estate, by death, resignation, incapacity or for any other cause be any time reduced to less than six, the remaining trustee, if only one or if more the remaining trustees jointly, together with the beneficiary or beneficiaries at the time, if of full age, and if not such remaining trustee or trustees without such beneficiary or beneficiaries may appoint by deed succeeding trustees, one or more, either individuals or a Trust Company, so as to increase the number to seven. Upon such succeeding trustee or trustees, together with the remaining trustee or trustees, I confer all the authority which I have conferred upon the trustees herein named, except as in my will and in any codicil specifically otherwise provided. I authorize and empower the remaining trustee or trustees to execute all the necessary instruments to vest the succeeding trustee or trustees jointly with themselves with the trust estate.

If a successor trustee or trustees shall be nominated by my remaining trustees or trustee as provided in this article of my will, and to the appointment of such successor trustee or trustees the beneficiary or beneficiaries of the trust who is or are of full age shall object, I do hereby provide that such remaining trustees or trustee may and at the request of such beneficiary or beneficiaries shall appoint as successor trustee or trustees any trust company of the City of New York, or any corporation created and existing by and under the laws of any foreign country, and authorized to execute trusts, such trust company or foreign corporation to be trustee jointly with the remaining trustees or trustee, or in case — their death or resignation to be sole trustee, and upon such trust company or foreign corporation I confer all the authority which I have conferred upon the trustees named in my will, except as in my will and in any codicil to be hereafter executed shall be specifically otherwise provided. I authorize and empower the remaining trustees or trustee to execute all the necessary instruments to vest such trust company or foreign corporation, either jointly with them or singly as the case may be, with the trust estate.

All power and authority which by my will I have conferred or which by any codicil I shall confer upon the trustees of any of the trusts created by such will and codicil, I hereby confer upon a majority in number of those who at the time shall be trustees, provided, however, that one of my sons-in-law, if one shall be living, shall form part of the majority, that is to say, that the majority shall not possess such power and authority unless it shall include one of my sons-in-law, if living.

Forty-first: As to certain accounts due to me individually from various persons, and which are entered on a sundry debtor account contained in my private ledger, and as to all amounts which may be due from any relatives or the husband of any relatives of mine, I give the fullest discretion in respect thereto to my executors, so that they may either collect the same or any part thereof, or extend the time for the payment thereof or collect the interest thereon, or entirely remit or release either the whole or any part of the interest or principal or both as to them may seem proper, it being my express wish that my executors shall not be held liable by reason of the loss of any such debtor account.

Forty-second: It is my wish and I hereby direct my executors not to file any inventory of my estate nor to make any formal accounting in any court unless legally compelled so to do. And I hereby request and direct my trustees not to require such inventory or accounting, my will being that my trustees shall, so far as my personal property bequeathed to them in trust is concerned, be answerable only for so much thereof as shall be actually delivered or paid over to them by my executors.

Forty-third: I hereby cancel, annul and revoke all former wills or other testamentary dispositions by me made.

In Witness Whereof, I have hereunto set my hand and seal this 14th day of August, in the year one thousand eight hundred and ninety-nine.

A. WOLFF. [SEAL.]

Signed, sealed, published and declared by the above-named testator Abraham Wolff on the day of the date thereof, at the City of New York, as and for his last will and testament, in the presence of us and of each of us, who, in his presence, and in the presence of each other and at his request, have hereunto subscribed our names as attesting witnesses, and the said testator at the time of exe-
51 cuting the same did acknowledge and declare the same to be his last will and testament.

HERBERT PARSONS,
30 E. 36th Street, City and County of New York.
E. VIETOR FROTHINGHAM,
214 St. James Pl., Bor. of Brooklyn, City of New York.
H. J. G. MERRITT,
Dumont, Bergen Co., New Jersey.

State of New Jersey,

Morris County Surrogate's Office.

MORRIS COUNTY, *ss:*

I, Augustus H. Bartley, Surrogate of the said county and clerk of the Orphans' Court thereof, the same being a Court of Record, do hereby certify that I have compared the foregoing copy of the last Will and Testament of Abraham Wolff, late of the County of Morris and State of New Jersey, deceased, with the original record thereof, now remaining in my office, and have found the same to be a true copy therefrom.

In testimony whereof, I have hereunto set my hand and seal of office this Twenty-fifth day of January A. D. Nineteen hundred and Seventeen.

[SEAL.] A. H. BARTLEY,
Surrogate, etc.

52 "EXHIBIT B."

Morris County Surrogate's Office,

Morristown, N. J.

STATE OF NEW JERSEY,
Morris County, ss:

I, David Young, Surrogate of said County, do hereby certify that the last Will and Testament of Abraham Wolff, late of said County,

deceased, has been admitted to probate, and that Otto H. Kahn and Henri P. Wertheim two of the Executors therein named have duly qualified as such Executors and are authorized to take upon themselves the administration of the estate of the testator agreeable to the said Will.

Witness my hand and seal of office at Morristown, in said County, this Eighth day of November A. D. nineteen hundred.

[SEAL.] (Signed) DAVID YOUNG,
Surrogate.

[REVENUE STAMP.]

II. *General Traverse.*

Filed September 1, 1917.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

53 III. *Argument and Submission of Case.*

On March 11, 1920, this case was argued and submitted on merits by Mr. Harry T. Newcombs, for the claimants, and Mr. Charles S. Bradley, for the defendants.

IV. *Findings of Fact, Conclusion of Law and Opinion of the Court by Downey, J.*

Entered April 5, 1920.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following:

Findings of Fact.

I.

Abraham Wolff, a loyal citizen of the United States and of the State of New Jersey, residing at Morristown, Morris County, N. J., died on October 1, 1900, leaving a valid last will and testament, which was, on November 7, 1900, duly admitted to probate in the Orphans' Court of said county and State, a court of competent jurisdiction, and of which Otto H. Kahn and Henri P. Wertheim Van Heukelom, petitioners herein, are duly appointed, qualified, and acting executors. The said Otto H. Kahn and Henri P. Wertheim Van Heukelom are loyal citizens of the United States.

A copy of the will of said decedent is attached to the petition marked "Exhibit A" and is made a part hereof by reference.

II.

The said Abraham Wolff, deceased, left him surviving his daughters, Addie W. Kahn and Clara W. Wertheim, who were the legatees designated in the several paragraphs of his will and also in subdivisions 1 and 2 of the twenty-eighth paragraph thereof, and the legatees designated in the other paragraphs of his will which are incorporated in the body of the petition.

III.

The estate of Abraham Wolff was a large one, amounting to seven or eight million dollars. He had been in business in New
54 York City and had long resided there having taken up his residence in New Jersey only a short time before his death, and there was some question as to his residence at the time of his death. His will was finally probated in New Jersey, November 7, 1900, but the Comptroller of the State of New York, contending that decedent's residence was in that State claimed State transfer or inheritance taxes on that basis as against the basis of nonresidence claimed by the executors, and the controversy continued until the latter part of 1903. There were some other questions as to interests of the estate involving questions of taxability on the assumption of nonresidence, which, after appeals from the appraiser to the surrogate, were compromised and the appeals dismissed in November, 1903. The comptroller abandoned his contention that deceased was a resident of New York.

IV.

None of the funds directed by the various paragraphs of the will to be paid to the trustees for the benefit of the various beneficiaries named were paid to the trustees or set apart or established on or before July 1, 1902. For the period from October 1, 1900, to July 1, 1902, 21 months, and thereafter, until the payment to the trustees of the sum provided to be paid to them, the legatees named in paragrap-s 6 to 22 (except paragraphs 18 and 19) were paid the monthly sums directed in said paragraphs to be paid to them until the trustees should receive the principal sum named therein and for said period of 21 months to July 1, 1902, they were paid by the executors the following amounts:

Beneficiary.	Monthly rate.	Total.
Flora Wolff, niece	$120	$2,520
Matilda Steinam, niece	150	3,150
Nellie Morris, niece	125	2,625
Louis S. Myer, nephew	65	1,365
Alfred E. Frank, nephew	65	1,365
Rosa Keiffer, niece	180	3,780
Fanny Elson, niece	150	3,150
Babette Myer, sister	150	3,150
Athalie Frank, sister	....	825
Carrie Rauch, niece	160	3,360
Benjamin Frank, nephew	65	1,365
Tillie Lehrburger, niece	160	3,360
Lottie Elson, sister	375	7,875
Nanette Jacobs, niece	125	2,625
Celia Loeb, niece	125	2,625
Total	.....	43,140

V.

Prior to July 1, 1902, Addie W. Kahn, one of the two residuary legatees, was paid by the executors out of the income of the estate, various sums each month from January, 1901, to June, 1902, both inclusive, aggregating from the personal estate $307,488.77 and from income from real estate $23,274.56, a total of $330,763.33.

VI.

Prior to July 1, 1902, Clara W. Wertheim, one of the two residuary legatees, was paid by the executors out of the income of the
55 estate, various sums each month from January, 1901, to June, 1902, both inclusive, aggregating from the personal estate $307,488.73 and from income from real estate $25,274.56, a total of $330,763.29.

VII.

The legacies to Edward S. Steinam, Louis Keller, and Louis Elson, provided by the fourth paragraph of the will, and the legacy to Stanley L. Wolff, provided by the twenty-fourth paragraph of the will, were satisfied prior to July 1, 1902.

VIII.

The specific legacies to the two daughters of said decedent, Addie W. Kahn and Clara W. Wertheim (who were also the beneficiaries of the trusts provided to be established out of the residuary estate) provided by the second paragraph of the will were satisfied prior

to July 1, 1902, and the clear value of the property passing to each of said daughters under these specific legacies was $5,000.

IX.

Except as stated in Findings IV, V, VI, VII, and VIII, no legacy in excess of $10,000 in actual or clear value was satisfied in whole or in part or advances made on account of any such legacy prior to July 1, 1902.

X.

The statutes of the State of New Jersey, in force during the period material herein, provided:

(1) That executors must inventory and appraise estates within three months after grant of letters testamentary unless further time is granted by the court.

(2) That every executor under a will shall state and settle his account in the surrogate's office within one year after his appointment unless the court for good cause shown should extend the time. (Compiled Stats., N. J., 1910, vol. 3, sec. 114.)

(3) That in case of an executor's failure to so settle his account, any person interested in the estate may cite him to make such settlement at the ensuing term. (Id., sec. 116.)

(4) That if no time is fixed in a will for the payment of legacies therein created, the executor has one year after probate in which to pay them. Legatees may maintain action against an executor for the payment of legacies after the expiration of one year. (Id., sec. 1.)

(5) That the orphans' court or surrogate of the proper county is authorized to give public notice to creditors to present their debts, demands, and claims against the decedent's estate within nine months from the date of such order by setting up notice in public places in the county and also by advertising the same for a specified time in one or more newspapers of said State.

(6) That after the expiration of the time in such order limited, the orphans' court or the surrogate of the proper county upon proof to its or his satisfaction that notice thereof has been set up and advertised as directed, may by final decree order that all creditors who have not brought in their claims within the time in said order directed shall be barred from any action therefor against the
56 executor, and any creditor who has neglected to bring in his debt, demand or claim within the time so limited shall by such decree be forever barred of his action against the executor. (Id., sec. 1.)

XI.

On the 7th day of November, 1900, pursuant to an order of the surrogate that day made, public notice was given by the executors to all persons having claims against the estate of the decedent to present the same on or before the 7th day of August next ensuing.

Proof was made of the setting up of the notice in five public places and of its publication in The Jerseyman once each week for nine successive weeks beginning November 9, 1900. The order of surrogate of date November 7, 1900, was as follows:

"On application of the above-named executors it is ordered that the said executors give public notice to the creditors of the estate of said decedent, to bring in their debts, demands, or claims against the same, under oath, within nine months from this date, by setting up a notice of this order, within twenty days here*in*after in five of the most public places in the county of Morris for two months, and also within the said 20 days, by advertising the same in the Jerseyman, one of the newspapers of this State, for the same space of time; and if any creditor shall neglect to exhibit his or her debt, demand, or claim, within the said period of nine months, public notice being given as aforesaid, such creditor shall be forever barred of his or her action therefor against the said executors."

And on August 8, 1901, the surrogate made the following order:

"It appearing by due proof that the notice given pursuant to the order of the surrogate, made on the 7th day of November, 1900, limiting creditors of the estate of the above-named decedent to nine months to bring in their claims and demands against said estate, has been advertised and published according to law:

It is ordered that all creditors of said estate who have neglected to bring in their claims and demands against said estate within the time so limited be forever barred from their action therefor against the executors of said decedent."

XII.

The clear value of the legacies to Edward S. Steinam, Louis Keller, Louis Elson, and Stanley L. Wolff, and of the specific legacies to the two daughters of the decedent, Addie W. Kahn and Clara W. Werthein, was ascertained and they were satisfied previous to July 1, 1902.

The values of the legacies in trust provided for in the sixth to the twenty-second (except the eighteenth and nineteenth) paragraphs of the will, of which the persons named in Finding IV were the beneficiaries, were ascertainable before July 1, 1902. The value of the estate was such and known to be such that no pending controversy could affect the value of any but the residuary legacies, and there is no reason shown why these trusts should not have been set up before July 1, 1902. They were not set up before July 1, 1902,

and why they were not so set up is not shown except inferentially.

The clear values of the residuary legacies in trust were not ascertained and could not have been accurately ascertained before July 1, 1902, because of pending questions, the determination of
57 which would to some extent offset their value. The bulk of these trusts could have been set up before July 1, 1902.

XIII.

On or about April 4, 1904, Otto H. Kahn, one of the executors, presented to the Collector of Internal Revenue for the Fifth District of New Jersey a claim for the refund of $26,637.59 of the legacy taxes paid as aforesaid, which claim was at some time thereafter transmitted to the office of the Commissioner of Internal Revenue.

Said claimant in an affidavit alleged that the total tax of $107,398.16 was paid because of a notification by the collector that if not paid by a time stated he would proceed to collect the same with penalty and interest; that it was paid under protest; and that $26,637.59 thereof was erroneously, improperly, and illegally assessed for reasons stated. Said sum was made up of three items, as follows:

(1) The sum of $13,918.53 was alleged to have been erroneously assessed because in valuing the estate of the decedent there had been included therein the sum of $779,108.02 as the value of decedent's interest in certain syndicate transactions, whereas, in effect, it had been demonstrated that the net value of the decedent's interest in said transactions was only $49,993, an overvaluation of $729,115.02.

(2) The sum of $10,729.97 was alleged to have been erroneously assessed because in valuing the estate of said decedent there was included therein the sum of $600,539.21 as decedent's interest in the profits of the firm of Kuhn, Loeb & Co., of which he was a member, whereas such interest in said profits did not at the time of the death of the said decedent have any ascertainable value nor any value at all, and that the valuation by the commissioner was erroneous and excessive and that by so valuing said interest and including the same in the valuation of the estate he had thereby increased by said sum of $10,729.97 the amount of the tax upon the life interest of the residuary legatees.

(3) That the sum of $1,989.09 had been erroneously assessed on the future interest of Addie W. Kahn and Clara W. Wertheim in the specific trusts provided in paragraphs 6 to 22 (except 18 and 19) of the will, which trust funds upon the death of the life beneficiaries were to be added to and form a part of the residuary estate, for the reason that the assessment of said amount so made against the life estates of the residuary legatees was upon contingent beneficial interest which prior to July 1, 1902, had not vested in possession or enjoyment.

The claim with reference to the matter set up in the first and second paragraphs did not assert any erroneous assessment because upon contingent beneficial interests which had not vested in possession or

enjoyment. The facts asserted were in support of the contention that the amounts and interests mentioned were erroneously included in the valuation of the total estate.

This claim was examined and approved for allowance in the sum of $14,008.36 by the chief of the Division of Claims and by the Committee on Claims in the office of the Commissioner of Internal Revenue in April, 1905, and $12,629.23 thereof was rejected. The Commissioner of Internal Revenue thereupon approved the allowance of the claim to the amount of $14,008.36 and its rejec-
58 tion as to said sum of $12,629.23, and it was sent to the auditor for settlement. Upon a revision of the assessment $729,115.02 was deducted from the valuation of the estate as error in syndicate transactions as asserted in the first paragraph of the claim. The tax was recalculated and $13,983.36 of the claim was allowed which, in addition to the matters set up in said first paragraph, included also an allowance of the sum of $1,989.09 set up in the third paragraph of the claim, apportioned to the interests of Addie W. Kahn and Clara W. Wertheim in the respective sums of $915.35 and $1,073.74, and an allowance of $294.70 on account of the assessment against the residuary legatees of the second life interest of Fannie Phillips, under the fourteenth paragraph of the will, and said sum of $13,983.36 was repaid to the executors.

XIV.

On or about the fifteenth of May, 1905, Otto H. Kahn and Louis A. Heinsheimer, who in their affidavit alleged that they, together with Henri P. Wertheim, were the sole trustees of the trusts created by the will of Abraham Wolff, deceased, filed a claim with the Commissioner of Internal Revenue for the refund of two sums, namely, $13,986.36 (presumably intended to be $13,983.36) and $37,673.13, alleged to have been erroneously assessed and collected. The said sum of $13,986.36 ($13,983.36) was alleged to have been included in the sum of $26,637.59 previously claimed (Finding XIII), and was on account of the erroneous inclusion in the valuation of the estate of the decedent of his alleged interest in certain syndicate transactions in which the firm of which he was a member was interested at the time of his death. The said sum of $13,986.36 ($13,983.36) had been previously allowed, but the payment thereof had been temporarily suspended at the request of the executors. As a basis for the claim $37,673.13, it was alleged that Clara W. Wertheim had died on August 15, 1903, and that the actual duration of her life estate was, therefore, less than three years. It was also alleged that the value of this life interest had been erroneously computed and an erroneous rate applied and, for the reasons stated, it was alleged that the assessment as against her life estate should have been but $4,408.78 instead of $42,081.91, a difference of said sum of $37,673.13. On June 15, 1905, the Commissioner of Internal Revenue notified the collector of the fifth district of New Jersey, and directed him to notify the claimants that said sum of $13,986.36

had been allowed on the prior claim and that the claim as to said sum of $37,673.13 was rejected.

On or about November 1, 1905, Otto H. Kahn and Henri P. Wertheim, as executors of the will of Abraham Wolff, deceased, commenced an action in the Supreme Court of the State of New Jersey against Herman C. H. Herold as Collector of Internal Revenue for the Fifth District of New Jersey, for the recovery of said sum of $37,673.13 with interest, which action was on November 22, 1905, removed to the United States Circuit Court for the District of New Jersey, and in said court on or about December 11, 1906, judgment was rendered for the plaintiffs against said collector in the sum of $33,703.19 and interest, said sum being a part of the amount which had been assessed and collected upon the interest of Clara W. Wertheim as a legatee under the will of said decedent. In determining the amount of the judgment the court found that the tax properly to be assessed amounted to $10,097.14, which, deducted from $42,081.91, left $31,984.77, for which sum, with interest, a verdict was given, the figures "subject to adjustment and correction by counsel." (147 Fed., 575 at 585.) Upon appeal said judgment was in May, 1908, affirmed by the United States Circuit Court of Appeals for the Third Circuit. (159 Fed., 608.) On the 12th of December, 1908, a claim predicated upon said judgment was settled by the Auditor for the Treasury Department and allowed in the sum of $44,381.80 and was thereafter paid.

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XV.

On June 6, 1911, Mortimer L. Schiff, alleging in his affidavit that he and Otto H. Kahn "are the sole trustees under the will of Abraham Wolff," filed a claim, transmitted to the office of the Commissioner of Internal Revenue for the refund to the trustees of the sum of $44,305.72 of the sum of $107,398.16 paid by the executors.

The claim alleged the payment of $107,398.16 by the executors, that said sum included $47,877.88 assessed on the interest of Addie W. Kahn as a life beneficiary, that $5,794.22 (included in the sum of $13,983.36) has been refunded, leaving $42,083.26 collected on the interest of Addie W. Kahn and unrefunded, of which it is alleged that $37,121.82 was a tax collected on a beneficial interest which had not vested in possession or enjoyment prior to July 1, 1902. The claim also included $7,193.90 alleged to have been erroneously assessed and collected on the life interests of the beneficiary under paragraphs 6 to 22 (except 18 and 19) of the will in connection with which it is alleged by the claimant that those beneficiaries, previous to July 1, 1902, had received certain amounts of "income" set out in a table submitted, which are the same amounts shown in Finding IV, and that the assessment of said life interests at their determined value according to the mortality tables was erroneous because they were contingent beneficial interests which had not vested in possession or enjoyment before July 1, 1902, and that the difference between the tax actually collected and paid on said life interests and the amount of tax thereon had it been computed and assessed on the

amount to which such beneficiaries had become entitled prior to July 1, 1902, is said sum of $7,183.90.

This claim was examined, and on February 28, 1912, was submitted for rejection by the Chief of the Claims Division; rejection was approved by the committee on claims and on or about that date it was rejected by the Commissioner of Internal Revenue.

XVI.

On November 23, 1915, H. T. Newcomb, a member of the firm of Newcomb, Churchill & Tracy, attorneys for Otto H. Kahn, described as "executor of the last will of Abraham Wolff, deceased," filed with the collector of internal revenue for the fifth district of New Jersey, a claim afterwards transmitted to the Commissioner of Internal Revenue, for the refunding of $59,711.61. The claim recited the allowance and repayment of $13,983.36 and $33,703.19, and the amount of the claim was the difference between the sum of those amounts and the total tax of $107,398.16. Refund was claimed on the ground that it was a tax on legacies, which had not vested
60 in possession or enjoyment prior to July 1, 1902, and that the legacies left in trust by the will had not been turned over to the trustees prior to that date.

On August 14, 1916, the claim was rejected by the Commissioner of Internal Revenue.

XVII.

After a return by the executors of the personal estate of the decedent, with a schedule of legacies arising under the will, and after investigation and correction under the direction of the Commissioner of Internal Revenue, the Collector of Internal Revenue of the Fifth District of New Jersey assessed a tax of $107,398.16 as a legacy tax under section 29 of the act of June 13, 1898, and amendments, and on October 26, 1903, notified the executors of such assessment, and on November 5, 1903, or, theretofore, as to part the executors paid said amount to said collector who, in the usual course of business, paid the same into the Treasury of the United States. Directions to the collector from the Commissioner of Internal Revenue as to the assessment of "this balance tax due" contained a summary of "bequests as amended by this office" with tax to be assessed thereon, in which appears "Total tax, $107,398.16," "Tax paid, $68,533.10," and "Tax due, $38,865.06." Whether the whole amount of $107,398.16 was paid November 5, 1903, as appears in parts of the record, or whether $68,533.10 thereof had been previously paid can not be found.

The amounts assessed and collected in respect of the several interests in said estate were as follows:

Names.	Bequests taxable.	Rate per $100.	Tax.
Edward S. Steinam	$15,000.00	$1.50	$225.00
Louis Keller	15,000.00	1.50	225.00
Louis Elson	15,000.00	1.50	225.00
Flora Wolff	23,393.95	1.50	350.91
Maltilda Steinam	34,079.23	2.25	766.78
Nellie Morris	24,148.72	1.50	362.23
Louis Myer	11,085.70	1.50	166.29
Albert S. Frank	12,595.41	1.50	188.93
Rosa Keiffer	35,090.93	2.25	789.54
Fannie Elson	28,237.20	2.25	635.33
Babette Myer	10,918.56	.75	81.88
Athalie Frank	26,076.42	1.12½	293.36
Carrie Rauch	34,496.54	2.25	766.17
Benj. Frank	13,215.71	1.50	198.23
Tillie Lehrburger	38,746.49	2.25	871.79
Lottie Elson	42,679.28	1.12½	480.14
Nanette Jacobs	26,994.82	2.25	607.38
Celia Loeb	27,775.49	2.25	624.94
Stanley L. Wolff	10,050.00	1.50	150.75
Fannie Phillips, 2d L. I. in $60,000 at death of Athalie Frank	19,646.76	1.50	294.70
Addie W. Kahn, L. I. in ½ residue of estate or $3,012,326.48	2,127,888.15		
In other reversions	40,682.36		
Specific bequests	5,000.00		
	2,173,570.51	2.25	48,905.34
Clara W. Wertheim, L. I. in ½ residue of estate or $3,012,326.48	2,177,877.10		
In other reversions	47,721.69		
Specific bequests	5,000.00		
Total	2,230,598.79	2.25	50,188.47
Total tax			107,398.16

The assessment against the legacy of Fannie Phillips in the sum of $294.70 and the amount of $1,989.09 assessed on remainder interests of Addie W. Kahn ($915.35) and Clara W. Wertheim ($1,073.74) in "other reversions" were the sums included in
61 the allowance of $13,983.36 on the claim of April 4, 1904, set out in Finding XIII, and the remainder ($11,699.57) allowed on said claim was properly apportioned to the interests of

Addie W. Kahn and Clara W. Wertheim in the sums, respectively, of $5,794.22 and $5,905.35.

There was allowed and repaid on account of the residuary life interest of Clara W. Wertheim, as shown in Finding XIV, the principal sum of $33,703.19 and interest.

No other part of said tax was refunded.

The tax collected on the legacies of Edward L. Steinam, Louis Keller and Louis Elson provided in the fourth paragraph of the will and of Stanley L. Wolff provided in the twenty-fourth paragraph thereof, which had been satisfied prior to July 1, 1902, was $825.75.

XVIII.

Certain regulations promulgated by the Secretary of the Treasury and in force during the period herein involved were as follows:

"Claims for the refunding of assessed taxes and penalties must be made out upon Form 46. In this case, as in that of claims for abatement upon Form 47, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. The claim should be still further supported by an affidavit of the deputy collector of the proper division and by the certificate of the collector.

A claim for refunding should be made in the name of the party assessed, if living; if he is dead, there should be evidence of his death and the claim should be made in the name of the executor or administrator. Certified copies of the letters of administration or letters testamentary, or other similar evidence, should be annexed to the claim to show that the claimant is administrator."

In Treasury Decision No. 552, rendered with reference to section 29, act of June 13, 1898, is the following paragraph:

"When the decedent died prior to July 1, 1902, and the property was left in trust by the will, but had not been turned over to the trustee before July 1, 1902, legacy tax will not accrue."

Said holding was in no way revoked or modified.

Conclusion of Law.

Upon the facts found the court concludes as matter of law that the petition herein ought to be, and it is, dismissed, with judgment against plaintiffs for cost of printing, the same to be taxed and collected by the clerk.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court.

The action is to recover an unrefunded portion of certain legacy taxes assessed and collected on life estates provided in the will of Abraham Wolff, deceased, upon the ground that the assessments were upon contingent beneficial interests not vested in possession or enjoyment prior to July 1, 1902. The facts fully appear in the findings

and will not be repeated here. And for manifest reasons which will appear, questions involved may be disposed of without lengthy discussion except perhaps in one respect.

62 Since under the statute, section 3226, a claim for refund must be first made to the Commissioner of Internal Revenue before any action can be maintained in this or any other court, it is proper first to notice the claims filed with the Bureau of Internal Revenue which are relied upon as the basis for this action and they may best be disposed of by referring to them in their inverse order.

The last claim (Finding XVI) was filed on November 23, 1915, by one of the attorneys for Otto H. Kahn, one of the executors, and claimed a refund of $59,711.61, the total unrefunded balance of the taxes assessed and collected, and this claim was specifically predicated upon the ground that the tax collected was a tax on legacies which had not vested in possession or enjoyment prior to July 1, 1902. This claim was clearly filed too late. The act of July 27, 1912 (37 Stat., 240), had raised the bar of limitation imposed by existing statutes, but it had specifically required that claims thereunder should be filed on or before the first day of January, 1914. No discussion of the question seems necessary. Coleman v. United States, 250 U. S. 30.

The next preceding claim asking a refund of the unrefunded portion of the tax assessed against the life interest of Addie W. Kahn, one of the residuary legatees, was filed June 6, 1911, by Mortimer L. Schiff, one of the trustees under the will of the decedent (Finding XV). Aside from another question which will be suggested later, it seems to us sufficient, so far as this claim is concerned, to call attention to the fact that the tax was paid by the executors under a provision of the will of the decedent, this action is brought by the executors and this claim was filed by one of the trustees under the will. It seems to us so clear that it can not constitute the required basis for this action or any part thereof, that we again refrain from discussion. Rand v. United States, 249 U. S. 503.

The next preceding claim was filed on May 15, 1905, by Otto H. Kahn and Louis A. Heinsheimer, trustees under the will of the decedent. A part of this claim had been already allowed, the balance was disallowed, suit was brought against the collector, judgment was rendered and it is apparent from the conclusions of the court referred to in the finding that all matters involved as to the full amount of the claim were adjudicated. We are aware of the holding that an adjudication against the collector of the internal revenue is not necessarily res judicata so far as the United States is concerned, but if this claim were not otherwise to be disposed of it might be for consideration that the judgment rendered became the basis of a claim filed by the executors against the United States upon the allowance of which the payment was made. But so far as the minor portion of this claim which was not included in the judgment and thus not paid is concerned, it is sufficient, in line with what has been suggested, to call attention to the fact that this claim was filed by trustees and not by the executors.

The next preceding claim (Finding XIII) and the only one left for consideration was filed April 4, 1904, by Otto H. Kahn, one of the executors. We are mindful of what has been said by the Supreme Court in the Sage case (250 U. S., 33), but since some doubt exists in our minds as to the application of the rule laid down in that case under the facts as they appear in the instant case with reference to the consideration of this claim as a proper basis for this action,
63 we venture to suggest the provisions of the statute which seem to us clearly to bar any action predicated upon this claim. We quote sections 3226 and 3227 of the Revised Statutes.

"Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of (the) Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: Provided, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: Provided, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

Section 3227 prohibits the maintenance of any suit in any court unless the same is brought within two years next after the cause of action has accrued. This claim was filed April 4, 1904. The cause of action accrued under the statute when the Commissioner of Internal Revenue rejected the claim or, if he did not act, when his decision thereon had been delayed for more than six months. The claim in part rejected was not refiled under the act of 1912, and no action was had thereon after its original rejection by the Commissioner of Internal Revenue. But conceding that the right of action thereon was revived by the act of 1912 and applying the holding in the Sage case, that until January 1, 1914, no statute of limitations could begin to run, which as to this case must be regarded as a liberal holding, it is still apparent that under section 3227 no action could

be maintained with this claim as its basis unless it were brought on or before January 1, 1916. This action was commenced July 2, 1917. The general statute of limitations in this court (section 156, Judicial Code) is not permissive in form in the sense that it specifically permits any action of which this court has jurisdiction to be brought at any time within six years, notwithstanding any other statute, but it forever bars any claim unless sued upon or transmitted within six years, and hence there is no necessary conflict between it and the provisions of section 3227, applicable to a particular class of cases, prohibiting the maintenance of any suit of this character in any court unless brought within two years. Fort Pitt Gas Co. v. United States, 49 C. Cls. 224 at 234, citing Christie-Street Com. Co. v. United
64 States, in the Circuit Court of Appeals for the Eighth Circuit, 136 Fed. 326, in which it was said: "It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued." And the last named case is cited with approval in United States v. Emery, 237 U. S. 28-32, although it was a jurisdictional question in this class of cases there under discussion, and it is said, as to these cases, that they are "founded upon the revenue law" of which section 3227 is a part. But for the Sage case, we would entertain the opinion that there could be no question that an action predicated upon this claim was barred in two years, and we entertain such doubt as to whether the Supreme Court intended under such circumstances to substitute the six-year statute of limitations in this court for the express provision of section 3227, that we venture to suggest the question.

Aside from this question there is another feature of this claim to which we call attention. The basis of the claim as to the different amounts going to make up the aggregate was stated in three separate paragraphs. As appears clearly from the findings the portions of the claim set up in paragraphs 1 and 2 were predicated solely upon averments of error in the inclusion of certain interests in the aggregate amount of the estate and upon the theory necessarily that the improper augmenting of the aggregate amount of the estate went to augment the value of the life estates of the residuary legatees on which a tax was assessed; but there is in these paragraphs of the claim no suggestion whatever that these life estates were not taxable. The only questions raised went to the amount. On the contrary, in the third paragraph of the claim wherein refund was sought of a tax assessed upon reversionary interests of these residuary legatees in certain specific trusts, the claim was specifically made that the assessment of these reversionary interests as part of the life interest of the residuary legatees was an assessment upon contingent beneficial interest, which prior to July 1, 1902, had not vested in possession or enjoyment. The basis of the claim as to the first and second paragraphs is not only clearly stated but the theory upon which it is predicated is the more apparent because of the inclusion, in the third paragraph, of the ground upon which recovery is now sought and its exclusion from the first and second paragraphs. And

it is to be observed that all of the claim which was predicated upon the ground that the assessment was upon a contingent beneficial interest was allowed and repaid. While the question is one, as far as we know, which has never been specifically decided, we are clearly of the opinion that the claim as presented being upon an entirely different theory from that upon which the action is predicated and, excluding by implication from its terms the theory of the subsequent action, and in effect conceding, except as to amount, the propriety of the taxes, is not such a claim as the law contemplates must be filed with the Commissioner of the Internal Revenue before action such as this can be maintained in this court.

We conclude that the plaintiffs are not entitled to recover.

Graham, Judge; Hay, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

65 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fifth day of April, A. D. 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the claimants, as aforesaid, are not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the claimants, as aforesaid, the sum of Two Hundred and Sixty Dollars and eighty-seven cents ($260.87), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. *Claimants' Application for and Allowance of an Appeal.*

Come now the plaintiffs by their attorney, and pray an appeal to the Supreme Court of the United States from the judgment entered herein on the fifth day of April, nineteen hundred and twenty, dismissing plaintiffs' petition.

H. T. NEWCOMB,
Attorney for Plaintiffs.

Filed May 10, 1920.

Ordered that the above appeal be allowed as prayed for.
May 10, 1920.

BY THE COURT.

66 Court of Claims.

No. 33809.

OTTO H. KAHN and HENRI P. WERTHEIM VAN HEUKELOM, as Executors of the Last Will and Testament of Abraham Wolff, Deceased,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Downey, J.; of the judgment of the court; of the claimants' application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this — day of May, A. D 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,677. Court of Claims. Term No. 334. Otto H. Kahn and Henri P. Wertheim van Heukelom, as executors of the last will and testament of Abraham Wolff, deceased, appellants, vs. The United States. Filed May 11th, 1920. File No. 27,677.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 52

OTTO H. KAHN and HENRI P. WERTHEIM VAN HEUKELOM, as Executors of the Last Will and Testament of Abraham Wolff, Deceased,

vs.

THE UNITED STATES.

Appeal From the Court of Claims

BRIEF FOR APPELLANTS

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 52.

OTTO H. KAHN and HENRI P. WERTHEIM VAN HEUKELOM, as Executors of the Last Will and Testament of Abraham Wolff, Deceased,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

STATUS.

Claimants brought suit in the Court of Claims, as executors of the will of Abraham Wolff, deceased, to recover $58,885.86, exacted from them by the Collector of Internal Revenue of the United States for the Fifth District of New Jersey under color of the legacy tax provisions of the Act of Congress of June 13, 1898 (*30 Stat. 448, 464-5*). The Court of Claims dismissed the petition (*R. 52*), with an opinion (*R. 48-52*) and the case is here on claimants' appeal.

QUESTIONS AT ISSUE.

The questions presented by the Record are:—

1. Was all, or any portion of, the sum sued for collected in respect of "any contingent beneficial interest . . . not absolutely vested in possession or enjoyment prior to . . . July 1, 1902," within the meaning of the Act of Congress of June 27, 1902 (*32 Stat. 406*)?

2. Did claimants, prior to bringing this suit, "present their claims," to the Treasury Department, in compliance with the second section of the Act of Congress of July 27, 1912 (*37 Stat. 240*)?

FACTS.

The facts found by the Court of Claims (*R. 38-48*) are summarized below:—

1. Appellants are the executors of Abraham Wolff, a loyal citizen of the United States and of the State of New Jersey who died on October 1, 1900, leaving a valid last will which was admitted to probate on November 7, 1900 (*R. 38*).

2. The will (*R. 18-38*) is made part of the findings of fact (*R. 38*).

3. The Collector of Internal Revenue originally exacted $107,398.16 (*R. 46*). Separate refunds of $13,983.36 and $33,703.19, a total of $47,686.55 (*R. 46*) have been made leaving $59,711.61 (*R. 46*) still in the possession of defendants. Claimants admit that $825.75 was lawfully collected (*R. 48*) and this suit was brought for the balance of $58,885.86 (*R. 17*).

4. The interest of Flora Wolff, in the estate of the decedent was assessed as having a "clear value" of $23,393.95 (*R. 47*) and the sum sued for includes

$350.91 exacted in respect of this interest (*R. 47, 48*). This interest was provided for by the Sixth (*R. 21*), Twenty-sixth (*R. 27*) and Thirty-seventh (*R. 34*) paragraphs of the will, as follows:

"Sixth. I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Flora Wolff for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided, and until my said trustees shall receive the aforesaid principal sum I do hereby direct my executors to pay out of the income of my estate to my niece Flora Wolff, the sum of One hundred and twenty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article."

"Twenty-sixth: If in the judgment of my executors, the survivors and survivor of them and his successors, the foregoing pecuniary legacies, trust and absolute, taken together shall exceed twenty per cent of so much of my estate as shall remain after the deduction of any and all inheritance, succession or any similar tax, and exclusive of the house and lot devised by the next article of this my will, it is my will that such pecuniary legacies shall ratably abate to such amount as will in the judgment of my executors, the survivors and survivor of them and his successors, taken together not exceed such twenty per cent."

"Thirty-seventh: As to all the trust provisions of my will I provide that under no circum-

stances shall any beneficiary be permitted to anticipate the income coming to him or her, or to make any disposition thereof prior to its receipt."

5. The will created interests similar to the foregoing in favor of other legatees, except that the amounts of principal and of the income to be paid pending the establishment of the trusts varied and each varied independently of the other. The facts are summarized below:—

Interest of:—	Paragraphs 26 and 27 of will and paragraph:—	Principal of trust fund	Monthly income to be paid pending setting up of trust fund	Assessment	
				Value assigned	"Tax" exacted
Louis S. Myer	9	$20,000.00	$65.00	$11,085.70	$166.29
Alfred E. Frank	10	20,000.00	65.00	12,595.41	188.93
Benjamin Frank	16	20,000.00	65.00	13,215.71	198.23
Flora Wolff	6	40,000.00	120.00	23,395.95	350.91
Nellie Morris	8	40,000.00	125.00	24,148.72	362.23
Nanette Jacobs	21	40,000.00	125.00	26,994.82	607.38
Lelia Loeb	22	40,000.00	125.00	27,775.49	624.94
Fanny Elson	12	50,000.00	150.00	28,237.20	635.33
Babette Myer	13	50,000.00	150.00	10,918.56	81.88
Matilda Steinam	7	50,000.00	150.00	34,079.23	766.78
Carrie Rauch	15	60,000.00	160.00	34,496.54	706.17
Tillie Lehrburger	17	60,000.00	160.00	38,746.49	871.79
Rosa Keiffer	11	60,000.00	180.00	35,090.93	789.54
Athalie Frank	14	80,000.00	250.00	26,076.42	293.36
Lottie Elson	20	100,000.00	375.00	42,679.28	480.14

—*R. 21-5, 40, 47.* (The interest of Flora Wolff, described more particularly in paragraph 4, above, is inserted in the table for comparative purposes. It is typical of the others as fully appears from the findings of fact cited.)

No part of any of the amounts stated in the last column of the above has been refunded (*R. 48*).

6. In respect of the interest of Addie W. Kahn in the estate of the decedent, the sum of $48,905.34 was exacted by the Collector (*R. 47*), of which

$915.35 (*R. 47*) and $5,794.22 (*R. 48*), making $6,709.57 in all, have been refunded, leaving $42,195.77 in possession of the defendants and included in the amount sued for. This interest consisted of an absolute legacy of the value of $5,000.00 (*Will, second paragraph, R. 18; R. 40-1*) and of a life interest (and no more) in one half of the residuary estate which passed to trustees in accordance with the twenty-eighth paragraph (*R. 28*).

7. In respect of the interest of Clara W. Wertheim in the estate of decedent, the sum of $50,188.47 was exacted by the Collector (*R. 47*), of which $1,073.74 (*R. 47*) and $5,905.35 (*R. 48*) and $33,703.19 (*R. 45, 48*), making $40,682.28 in all, have been refunded leaving $9,506.19 in possession of the defendants and included in the amount sued for. The interests of this residuary legatee were similar to those of Addie W. Kahn and were provided for by the same paragraphs of the will (*R. 18, 28, 40-1*).

8. None of the trust funds provided for in the will was paid to the trustees, or set apart, or established, on or before July 1, 1902 (*R. 39*).

9. The legatees named in paragraphs 6 to 22, except paragraphs 18 and 19, of the will were paid the monthly sums specified in those paragraphs (*R. 21-6, 39, 40*), the total sums paid to each of them to July 1, 1902, ranging from a minimum of $825.00 to a maximum of $7,875.00 (*R. 40*).

10. Addie W. Kahn received on or before July 1, 1902, an absolute legacy valued at $5,000.00 (*R. 40-1*), $307,488.77 income from personalty and $23,274.56 income from realty (*R. 40*).

11. Clara W. Wertheim received, on or before July 1, 1902, an absolute legacy valued at $5,000.00 (*R. 40-1*), $307,488.73 income from personalty and $25,274.56 income from realty (*R. 40*).

12. The Comptroller of the State of New York claimed that the decedent was a resident of that State, and not of the State of New Jersey, and attempted to establish, in the Courts of New York, certain claims to recover taxes on behalf of that State, based upon this claim of residence. This litigation was not concluded until November, 1903 (*R. 39*).

13. The clear values of the residuary legacies to Addie W. Kahn and Clara W. Wertheim were not ascertained and could not have been ascertained before July 1, 1902 (*R. 43*).

14. On April 4, 1904, Otto H. Kahn, one of the appellants, filed with the Collector of Internal Revenue for the Fifth District of New Jersey, a claim for the refund of $26,637.59. This claim was duly transmitted to the Commissioner of Internal Revenue and was thereafter allowed in the sum of $13,983.36, which was repaid to appellants and rejected for the balance (*R. 44*). It was not specifically alleged, in this claim, that the collection was in respect of contingent beneficial interests not vested prior to July 1, 1902 (*R. 43*).

15. On May 15, 1905, Otto H. Kahn, one of appellants, and Louis A. Heinsheimer, as trustees under the will, filed with the Commissioner of Internal Revenue a claim for $37,673.13 (in addition to the $13,983.36 claimed in the earlier claim, which had not then been repaid). This claim was rejected, but $33,703.19, of said $37,673.13, was subsequently recovered by suit (*R. 44-5, 48*).

16. On June 6, 1911, Mortimer L. Schiff, for himself and Otto H. Kahn, one of appellants, as trustees, filed a claim for the refund of $44,305.72. This claim alleged that the sum named had been exacted in respect of contingent beneficial interests not

vested in possession or enjoyment prior to July 1, 1902. This claim was rejected (*R. 45-6*).

17. Appellants, by their attorney, filed a claim for $59,711.61 on November 23, 1915, alleging that this sum had been exacted in respect of contingent beneficial interests not vested in possession or enjoyment prior to July 1, 1902. This claim was rejected on August 14, 1916 (*R. 46*).

18. A Treasury Department regulation, promulgated in connection with the law under which the Collector claimed to make this exaction, in force during the period involved, and in no way revoked or modified, is as follows:

> "When the decedent died prior to July 1, 1902, and the property was left in trust by the will, but had not been turned over to the trustee before July 1, 1902, legacy tax will not accrue." *R. 48.*

SPECIFICATIONS OF ERROR.

It is respectfully submitted that the Court of Claims was in error in the following:—

1. The Court of Claims erred in deciding that the whole amount sued for, and the amount exacted and now retained in the Treasury in respect of each legacy, was not exacted in respect of contingent beneficial interests not absolutely vested in possession or enjoyment prior to July 1, 1902, within the meaning of the Act of Congress of June 27, 1902 (*32 Stat. 406*).

2. The Court of Claims erred in deciding that appellants are not entitled to recover the whole amount sued for, and the amount exacted and now retained, in respect of each legacy, under the Act of Congress of July 27, 1912 (*37 Stat. 240*).

3. The Court of Claims erred in deciding that the claim filed on April 4, 1904 (*R. 43*), May 15, 1905 (*R. 44*), June 6, 1911 (*R. 45*), and November 23, 1915 (*R. 46*), do not satisfy the requirements of the second section of the Act of Congress of July 27, 1912 (*37 Stat. 240*).

ARGUMENT.

It will be argued:—

1. That this suit is supported by the claim required by the statute, and

2. That appellants are entitled to recover on the merits.

FIRST.

This suit is supported by the claim required.

Relief is claimed under the second section of the Act of July 27, 1912 (37 Stat. 240). This section reads as follows:—

> "That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

The foregoing may be enforced by suit and relieves any such suit from the limitations of R. S. 3226 and R. S. 3227 (*United States v. Hvoslef, 237 U. S. 1; Rand v. United States, 249 U. S. 503, 508; Sage v. United States, 250 U. S. 33, 39.* It is subject, however, to a limi-

tation, contained in the first section, that claims must be filed not later than January 1, 1914 (*Coleman v. United States, 250 U. S. 30; Sage v. United States, supra*).

The Record shows four claims (*R. 43, 44, 45, 46*), only one of them covering the entire amount sued for.

Claim for $26,637.59 was filed on April 4, 1904 (*R. 43*). On this claim $13,688.66 (*R. 44*) was refunded and at the same time there was refunded $294.70 which had not been claimed (*R. 44*), making a total refund of $13,983.36 (*R. 44*). Under *Sage v. United States, supra*, claimants are entitled to rely on this claim as sustaining suit as to the rejected portion thereof or $12,948.93, which includes $6,412.97 in respect of the interest of Addie W. Kahn and $6,535.96 in respect of the interest of Clara W. Wertheim. This claim was given new life by the refunding act of July 27, 1912.

> "The statute of course does not confine its act of justice to unrejected claims." *Sage v. United States, 250 U. S. 33, 38.*

The Court of Claims rejected this claim, as lawful basis of suit, because it concluded (*R. 52*) that it was presented upon a "different theory from that upon which the action is predicated." The learned Judge who wrote the opinion notes that this is a rule never "specifically decided," which is undoubtedly true. In the numerous cases to be found in the books it was never before considered desirable to raise any question as to the character of the claim filed, if there was actual claim within the period limited by law. It is submitted, however, that the mere form of the claim is not conclusive as to the grounds on which it was urged and that if it were, claimants ought not to be required, at their peril, to state

their claims in technical language. Statutes authorizing claims are enacted to enable prompt collection and should be construed so as to effect that purpose, not so as to drive the taxpayer to exhaust his remedies before payment. The rigorous interpretation suggested by the Court of Claims does violence to custom and to judicial interpretations long ante-dating the Act of 1912, which must have been known to Congress at the enactment of that statute. An example is found in *Wayne v. United States, 26 C. Cls. 274.* In that case it was urged, as a matter of defense, that—

> "the original allowance or award, by the Commissioner of Internal Revenue was void, because the claim was not presented to him in a formal manner on a blank prescribed by the Secretary of the Treasury, within the time limited by the Act (*R. S. 3228*)." ***26 C. Cls. 274, 289.***

The facts in regard to the claim, as stated by the reporter of the Court of Claims, were as follows:

> "James M. Wayne was an associate justice of the Supreme Court of the United States from September 1, 1862, to June 30, 1867. Pursuant to the Acts of July 1, 1862, Section 86 (*12 Stat. 472*); Act of June 30, 1864, Section 123 (*13 Stat. 285*), and the amendments of July 4, 1864 (*13 Stat. 417*), and 14 Stat. 139, 480, there was deducted from the salary of said justice the sum of $1,123.97 income tax from September 1, 1862 to June 30, 1867. On the thirtieth day of April, 1872, a statement was made out in the Comptroller's office showing the amount so withheld from Mr. Justice Wayne's salary and was attached to a blank form of application for refund of taxes improperly paid. . . . It does not appear that any formal written application for refund of said tax was ever filed in the office of the Com-

missioner of Internal Revenue by Mr. Justice Wayne." *26 Ct. Cls. 274, 276.*

Concerning the validity of the claim thus described, the Court of Claims said:

> "In the opinion of the Court this was a sufficient presentation of the claim within the meaning of the statute and the regulations, accepted as it was by the Commissioner." *26 C. Cls. 274, 290.*
>
> See, also *14 Opinions Attorney General, 615.*

Such statutes are always construed with liberality. It is especially incumbent upon all courts, tribunals, and officers administering such statutes, to apply this rule when, as in the case at bar, injustice and injury would otherwise result and it is impossible that injury or injustice should result to either party from its application.

> "Statutes which . . . give compensation to those whose property is taken compulsorily, (and) statutes which are in favor of those on whom taxes are assessed or burdens laid . . . are remedial and to be liberally construed." *Lewis' Sutherland, Statutory Construction, second edition, section 680.*
>
> See, also, *Neurath v. District of Columbia, 17 C. Cls. 225.*

Claim for $37,673.13 (*R. 44*) was filed, in the instant case, on May 15th, 1905, and, after suit against the Collector (*R. 45, 48*) $33,703.19 was refunded on account of this claim, leaving $3,969.94 of the sum claimed still in possession of defendants. This claim, as to the rejected balance, also obtained new life from the Act of July 27, 1912. The fact that the Collector obtained judgment as to this balance does not affect the present suit.

> "The former judgment is not a bar . . . if

> the judgment otherwise were a bar, the bar would be removed by the subsequent enactment of the Act of July 27, 1912 . . ." *Sage v. United States, 250 U. S. 33, 36, 38.*

This claim was made by one of appellants (and another), who was and is executor, but who called himself "trustee." The Court of Claims rejected it, as basis of suit, because (1) of this misdescription and (2) on the ground rejected by this Court in *Sage v. United States, supra.* Neither objection is considered tenable. Appellant was entitled to make claim and did make claim. That he referred to himself as trustee when he might better have used the word "executor" is too highly technical an objection to stand in the way of substantial justice on the merits.

Claim for $44,305.72 was filed on June 6, 1911 (*R. 45*), and wholly rejected (*R. 46*). This claim, also, was given new life by the Act of July 27, 1912. *Sage v. United States, supra.* It was made by Mortimer L. Schiff for himself and for Otto H. Kahn, one of appellants, but designated in the claim as "trustees." Refusal of the Court of Claims to consider it is again based upon the mere fact of the misdescription or upon that fact and that the trustee who was also an executor (and one of appellants) appeared only by representation (*R. 45, 49*). The latter ground is inconsistent with the decision in *Wayne v. United States, supra.*

Claim for the whole amount still withheld by defendants was filed on November 23, 1915 (*R. 46*). To the extent of the three earlier claims this was a demand for the benefit of the Act of July 27, 1912 (*Sage v. United States, 250 U. S. 33, 39*). To the extent that the amount withheld, and covered by this claim, exceeds the amounts

covered in the earlier claims, it must be admitted that, if the decision in *Coleman v. United States, supra,* is applicable, the present suit is not supported by the claim required by the Act of July 27, 1912 (*37 Stat. 240*). This would have the effect of excluding from the present suit the sum of $2,970.23 which is still withheld by defendants in respect of the interest of Clara W. Wertheim and would reduce the amount for which judgment should be given from $58,885.86 (the amount sued for) to $55,915.63. This total of $55,915.63 is fully covered by claims filed prior to January 1, 1914, the date limited by the Act of July 27, 1912.

> "The Act of 1912 applied in terms to 'all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected' under the above-mentioned Section 29. The only condition was that it should have been presented not later than January 1, 1914. Until that time no statute of limitations could begin to run." *Sage v. United States, 250 U. S. 33, 38.*

The only applicable statute of limitations is R. S. 1069 which fixes six years as the time within which suits must be brought in the Court of Claims. Whether it began to run on January 1, 1914, or when demand was made (November 23, 1915—*R. 46*) or when payment was refused (August 14, 1916—*R. 46*) is an open question, but one that cannot be of importance in this suit. The two years' limitation of R. S. 3227 does not apply— *United States v. Hvoslef, 237 U. S. 1; Rand v. United States, 249 U. S. 503, 508; Sage v. United States, 250 U. S. 33, 39.*

APPELLANTS ARE ENTITLED TO RECOVER ON THE MERITS.

The whole sum sued for was collected in respect of life interests in trust funds (*R. 21-8, 40, 47*) and none of these trust funds, nor any part of any of them, had been paid to the trustees prior to July 1, 1902 (*R. 42-3*) when the taxing act was repealed. If the Collector of Internal Revenue had obeyed the instructions of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury (*R. 48*), this collection would never have been made and this suit would not have been necessary. The authoritative ruling of the Commissioner was:

> "Where the decedent died prior to July 1, 1902, and the property was left in trust by the will, but had not been turned over to the trustee before July 1, 1902, legacy tax will not accrue." *Treasury Decision 552, R. 135.*

The foregoing was never revoked or modified (*R. 48*). It is submitted that the ruling thus formally announced is correct and ought to have been applied in the instant case.

All interests of legatees and distributees of testate or intestate decedents are "contingent," *within the meaning of the Act of July 27, 1902*, until the processes of administration have gone forward to the point at which ascertainment of the taxable values is practicable.

> *United States v. Jones, 236 U. S., 105;*
> *McCoach v. Pratt, 236 U. S. 562.*

There is a definite, direct and explicit finding of fact that the value of these residuary legacies could not be ascertained on July 1, 1902 (*Finding XII, R. 43*).

All the interests in the residuary estate in respect of which the portions of the sum sought to be recovered are

retained by defendants were interests in a trust fund provided for by the will. No part of this fund was set aside prior to July 1, 1902. These interests remained contingent on that date, not only because the fund remained unascertained (*R. 42-3*) but also because all such interests, in the practical sense in which the term was used (*McCoach v. Pratt, supra*), must be deemed contingent until there is an actual fund in the hands of the trustee to which they attach. This was the deliberate view of the Treasury Department (*supra, p.* 14).

Moreover, in the instant case, as to the smaller trust funds and the interests therein in respect of which taxes were computed, there were additional contingencies that were not satisfied before July 1, 1902. *The thirty-seventh paragraph of the will made all the interests in trust funds inalienable and prohibited anticipation. The twenty-sixth paragraph gave the executors discretionary power to diminish all pecuniary legacies* provided for by preceding paragraphs, thus assimilating these interests to those held to be contingent and the tax thereon refundable in *Uterhart v. United States* (*240 U. S., 598*), and to those as to which the United States confessed error on appeal to this Court in *Ryle v. United States* (*239 U. S., 658*). It was therefore, impossible to ascertain the value of these legacies until the value of the residuary estate could be ascertained (*see R. 43*) and this, as the finding states, could not be done prior to July 1, 1902.

The *interests defined by paragraphs six to twenty-two were contingent in still another sense.* All these paragraphs provide for trust funds of certain amounts (*subject to diminution in the discretion of the executors* under the twenty-sixth paragraph), and, also, for definite monthly payments until the establishment of the funds. And none of the funds was set up until after July 1, 1902.

The monthly payments were not proportioned to the trust funds—in other words, with trust funds of equal amounts one legatee would receive a larger monthly payment than another. For example, the trust funds for Flora Wolff and Celia Loeb were both $40,000 but the former received $120 per month (*R. 21, 40*) and the latter $125 per month (*R. 26, 40*). Trust funds of $60,000 were directed for Rosa Keiffer and Carrie Rauch, but the former was given, until the establishment of the fund, $180 per month (*R. 22, 40*) and the latter $160 per month (*R. 24, 40*). These rights to receive monthly payments were temporary and conditional rights, terminating within the discretion of the trustees and, therefore, subject to the rule of *Uterhart v. United States, 240 U. S. 598*. None of the legatees received, prior to July 1, 1902, as much as $10,000.00, the minimum taxable legacy, or any definite interest at all extending beyond that date in these monthly payments. As to the rights in the trust funds that were not set aside until after July 1, 1902, their interests were the same as those which were held not to be taxable (*Vanderbilt v. Eidman, 196 U. S. 480*). Yet *the Treasury Department wholly ignored these monthly payments in all its calculations*, and assumed to tax these interests as though these legatees took the income of the trust funds from the death of their testator. Letters testamentary were issued on November 1, 1900 (*R. 38*), but the processes of administration were delayed in spite of the diligence of the executors and even the amount of the New York transfer tax was not settled until late in 1903 (*R. 39*). Expenses of administration must necessarily have been incurred after July 1, 1902. On that date the value of the residuary estate could not be ascertained. The Court of Claims found this to be the fact (*R. 43*).

The judgment in *United States v. Jones, supra,* was placed not only upon the ground that—

> "debts and expenses had not been ascertained,"

but, also, upon the grounds that—

> "what, if anything, would remain after their payment was uncertain." *236 U. S. 105, 114.*

Extremely persuasive is the fact that the tax was a progressive tax, the rate increasing with the value of the distributive share or legacy. Resort to such a progressive tax plainly implies that *the tax is never to attach until the value becomes an ascertained value.* This consideration was found of importance in *United States v. Jones, supra,* the Court, with reference to legatees and distributees, saying:

> "The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. But *that that right was not intended to be taxed before there was an ascertained surplus or residue* to which it could attach is inferable from the taxing act as a whole and especially from the provisions whereby the rate of the tax was made to depend upon the value of the legacy or distributive share." *236 U. S. 105, 112.*

Conclusion.

Claimants should have judgment for the amount claimed. All of which is respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

OTTO H. KAHN AND HENRI P. WERTHEIM VAN HEUKELOM, as executors of the last will and testament of Abraham Wolff, deceased, appellants.
v.
THE UNITED STATES.

No. 52.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing appellants' petition (R. 52) for the recovery of $58,885.86, taxes collected by the collector of internal revenue for the fifth district of New Jersey under the provisions of section 29 of the act of June 13, 1898 (30 Stat. 448, 464-465), upon the right to inherit certain legacies created in the last will and testament of Abraham Wolff, deceased, who died a resident of the State of New Jersey on October 1, 1900. (R. 38). The legacies involved are life

interests in certain trust funds which appellants contend were contingent beneficial interests which had not vested in possession or enjoyment prior to July 1, 1902, within the meaning of the refunding act of June 27, 1902.

The decedent's last will and testament was admitted to probate and record on November 7, 1900, and the same day letters testamentary were granted to appellants. (R. 38.) Pursuant to an order dated November 7, 1900, of the State court of New Jersey having jurisdiction of the matter the executors, beginning with said date, published notice to creditors to present claims against said estate within nine months thereafter (R. 42), and by a later order, dated August 8, 1901, of the same court the presenting of claims was declared barred (R. 42).

The decedent left a large personal estate amounting to several millions of dollars. (R. 39.) Bequests which are here involved were made chiefly to nieces and nephews, the residuary estate being left in equal shares to the testator's two daughters. (R. 39, 40.)

The will of Abraham Wolff (R. 18–37) provided in the twenty-fifth paragraph thereof (R. 27):

> The gifts, legacies, and devises made and bequeathed in and by the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second twenty-third, twenty-fourth, and twenty-

seventh articles of this my will are to be paid free of any inheritance, succession, or other similar tax, and I hereby direct such tax to be borne by my estate.

All the legatees whose legacies are here involved received income therefrom prior to July 1, 1902 (R. 39). The following list gives the names of these legatees, and the amount which each legatee received *prior to said date* (R. 40):

Beneficiary.	Monthly rate.	Total.
Flora Wolff, niece	$120.00	$2,520.00
Matilda Steinman, niece	150.00	3,150.00
Nellie Morris, niece	125.00	2,625.00
Louis S. Myer, nephew	65.00	1,365.00
Alfred E. Frank, nephew	65.00	1,365.00
Rosa Keiffer, niece	180.00	3,780.00
Fanny Elson, niece	150.00	3,150.00
Babette Myer, sister	150.00	3,150.00
Athalie Frank, sister	.....	825.00
Carrie Rauch, niece	160.00	3,360.00
Benjamin Frank, nephew	65.00	1,365.00
Tillie Lehrburger, niece	160.00	3,360.00
Lottie Elson, sister	375.00	7,875.00
Nanette Jacobs, niece	125.00	2,625.00
Celia Loeb, niece	125.00	2,625.00
Total	.....	43,140.00

Prior to July 1, 1902, Addie W. Kahn, one of the two residuary legatees, was paid by the executors out of the income of the estate various sums each month from January, 1901, to June, 1902, both inclusive, aggregating from the personal estate $307,488.77 and from income from real estate $23,274.56, a total of $330,763.33.

Prior to July 1, 1902, Clara W. Wertheim, one of the two residuary legatees, was paid by the executors

out of the income of the estate various sums each month from January, 1901, to June, 1902, both inclusive, aggregating from the personal estate $307,488.73 and from income from real estate $25,274.56, a total of $330,763.29. (R. 40.)

The executors, appellants herein, on or about April 27, 1903, made a return of said decedent's personal estate for assessment of tax, giving a schedule of the legacies arising therefrom, the value thereof, and the amount of the tax which had accrued thereon. On or about November 4, 1903, the said executors paid the taxes assessed in respect to each legacy considered taxable, the aggregate amount of said taxes being the sum of $107,398.16. (R. 14.) Subsequently, upon claims for refund and as the result of a suit against the collector, taxes which had been collected in respect of certain legacies were refunded, leaving an unrefunded balance of $58,885.86. (R. 17.) As the United States contends that the claim for refund embodied in this action was never presented to the Commissioner of Internal Revenue in the manner nor within the time required by law, the claims for refund which were presented are particularly referred to.

1. Otto H. Kahn, one of the executors herein, on or about April 4, 1904, presented a claim in the sum of $26,637.59 for the refund of a portion of the tax collected, upon the ground that certain sums had been included as assets which were not assets of the decedent's estate, and that the residuary legacies had, accordingly, been erroneously increased in

value, and that the tax thereon was, therefore, excessive in amount. (R. 43.) This claim was allowed in part and the petitioners were paid the sum of $13,983.36. (R. 44.)

2. On or about May 15, 1905, Otto H. Kahn and others, as trustees under the will, presented to the Commissioner of Internal Revenue a claim for the refund of $37,673.13, upon the ground that in assessing the tax which had been collected upon the life interest of Clara W. Wertheim in one-half the residuary estate, the value thereof had been calculated by mortuary tables upon said legatee's expectancy of life, whereas she had died on August 15, 1903. It was contended that the tax upon her interest should have been calculated only for the actual period of her life following decedent's death. (R. 44.) This claim was rejected, and the executors brought an action in the United States Circuit Court for the District of New Jersey against the collector of internal revenue, to whom the tax had been paid. The plaintiffs were successful in this action and were awarded judgment for the amount claimed with interest. (R. 45.)

3. On or about June 6, 1911, Mortimer L. Schiff, as trustee under the will of said decedent, presented to the Commissioner of Internal Revenue a claim for the refund to the trustees of the sum of $44,305.72, in which it was stated that the various beneficiaries of life interests in the trust funds had received certain amounts of income therefrom prior to July 1, 1902, and that the tax should only have been collected

with respect to the amounts which the legatees had actually received. It was claimed that the balance of the tax collected with respect to the value of the said life interests in the whole amount of each trust fund should be refunded as a tax upon contingent beneficial interests which had not vested in possession or enjoyment prior to July 1, 1902. This claim was rejected. (R. 45.)

4. On November 23, 1915, Otto H. Kahn, as "executor of the last will of Abraham Wolff, deceased," through his attorney, filed with the collector of internal revenue for the fifth district of New Jersey, a claim for refund of $59,711.61, which claim was transmitted to the Commissioner of Internal Revenue. This claim recited the allowance and repayment of $13,983.36 and of $33,703.19 and claimed the difference between the sum of the above amounts and $107,398.16, the total tax paid. The claim for refund was based on the ground that the tax was assessed on legacies which had not vested in possession or enjoyment prior to July 1, 1902. This claim was rejected by the Commissioner of Internal Revenue on August 14, 1916. (R. 46.) This is the first time this identical claim was ever made.

The petition for the recovery of $58,885.86 was filed in the Court of Claims on July 2, 1917. (R. 1.)

QUESTIONS INVOLVED.

1. Was the tax, the refund of which is now sought, assessed upon contingent beneficial interests not vested in possession or enjoyment prior to July 1,

1902, within the meaning of the act of June 27, 1902 (30 Stat. 406)?

2. Was the identical claim upon which this action is based presented to the Commissioner of Internal Revenue prior to January 1, 1914, as provided by the act of July 27, 1912 (37 Stat. 240)?

ARGUMENT.

I.

Was the tax, the refund of which is now sought, assessed upon contingent beneficial interests not vested in possession or enjoyment prior to July 1, 1902, within the meaning of the act of June 27, 1902 (30 Stat. 406)?

This tax was assessed under the provision of the act of June 13, 1898, ch. 448 (30 Stat. 448, 464-465). Sections 29 and 30 of said act, so far as the same are material to this case, are as follows:

> SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any State or Territory, or any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or per-

sons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say * * *.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share * * *.

Section 30, supra, was amended by section 11 of the act of March 2, 1901, to read: "That the tax or duty aforesaid shall *be due and payable in one year after the death of the testator and shall* be a lien and charge upon the property of every person who may die, as aforesaid, for twenty years * * *."

The executors of the will, appellants herein, contended that the tax assessed upon the respective legacies or distributive shares under the said will should be refunded to them under the provisions of section 3 of the act of June 27, 1902, ch. 1160 (32 Stat. 406), because it is asserted that said legacies or distributive shares were contingent only and had not become

vested prior to July 1, 1902. Section 3 of said act provides:

> SEC. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. * * *

It has been held that a tax imposed by section 29 of the act of June 13, 1898, is a tax on the right of transmission of property. In *United States* v. *Perkins* (163 U. S. 625–628) it was said: "The tax is not upon the property in the ordinary sense of the term but upon the right to dispose of it," and in *Knowlton* v. *Moore* (178 U. S. 41, 56) the court said: "Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the *transmission from the dead to the living*, on which such taxes are

more immediately rested." (*United States* v. *Jones*, 236 U. S. 106–111.)

The tax being on the right to transmit and on the right of the legatee to receive the property transmitted, when the right to a particluar interest became fixed or accrued it became subject to the tax imposed by the statute. When the beneficiary had the *right to demand payment* of his legacy, then the liability to the tax arose. (*Knowlton* v. *Moore*, 178 U. S. 41–56; *Hertz* v. *Woodman*, 218 U. S. 205; *United States* v. *Fidelity Trust Company*, 222 U. S. 158; *United States* v. *Jones*, 236 U. S. 106; *Simpson* v. *United States*, 252 U. S. 547–551.)

Did the legatees have a right, prior to July 1, 1902, to the possession or enjoyment of the legacies under the will, and did they enter into the enjoyment thereof prior to that date?

In its findings of fact the Court of Claims (R. 42) found that the values of the legacies were ascertainable before July 1, 1902; that no pending controversy could affect the value of any but the residuary legacies; and that there was no reason shown why these trusts could not have been set up before July 1, 1902.

The laws of the State of New Jersey in force during the period of the administration of this estate provided that the executor under a will shall state and settle his account in the surrogate's office within one year after his appointment, unless the court for some good cause shown should extend the time (Comp. Stat. N. J., 1910, vol. 3, sec. 114); that in case of an executor's failure to so settle his account, any person

interested in the estate may cite him to make such settlement at the ensuing term (Id. sec. 116); and that, if no time is fixed in a will for the payment of legacies therein created, the executor has one year after probate in which to pay them. Legatees may maintain action against an executor for the payment of legacies after the expiration of one year. (Id. sec. 1.) It is also provided by the New Jersey statutes that the orphans' court, or surrogate of the proper county, is authorized to give public notice to creditors to present their debts, and that after the expiration of the time in such order limited the orphans' court, or the surrogate of the proper county, may, by final decree, order that all creditors who have not brought in their claims within the time in said order directed shall be barred from any action therefor against the executor. (R. 41.)

On November 7, 1900, public notice was given by the executors to all persons having claims against the estate, to present the same on or before August 7, 1901. (R. 42.) On August 8, 1901, the surrogate issued an order, in part, as follows: "It is ordered that all creditors of said estate who have neglected to bring in their claims and demands against said estate within the time so limited, be forever barred from their action therefor against the executors of said decedent." (R. 42.) It was possible, therefore, prior to July 1, 1902, to ascertain the present value of the legacies created under the will, and it was the statutory duty of the executors to do so within one year from the date of appointment.

Where the law of the State in which the estate is being administered provides that the executors must settle the estate or pay the legacies under the will within a specified time, the legatees have a right to possession or enjoyment of their legacies on and after the date specified, and the beneficial interests in the estate thereupon become vested. (*Simpson* v. *United States*, 252 U. S. 547–552.)

The several legatees enjoyed the income from the estate for twenty-one months prior to July 1, 1902. (R. 39, Par. IV.)

As to life interests, it was proper for the collector of customs in assessing the taxes, to use mortuary tables to ascertain the present worth of said interests. (*Simpson* v. *United States*, 252 U. S. 547–550.)

The entire clear value of the legacies could have been ascertained and shown prior to July 1, 1902. The legatees had a right to demand possession of their beneficial interests under the will prior to that date, and they did actually enter into the enjoyment of the income from such legacies. Under the decisions of this court, the interests created by the will became "vested in possession or enjoyment," prior to July 1, 1902.

In *Simpson* v. *United States*, *supra*, the court had under consideration questions similar to those involved in the present case. In that case, the decedent by will directed his executors to convert a large residuary estate into money, to divide the same into three equal shares, and to transfer two of such shares to a trustee, to be selected by them, in

trust to invest a nd reinvest, and to pay to each of his two daughters the whole of the net income of one share so long as she should live. This court held:

> The contention is that the excess of the assessment above the amount which had been actually paid to the trustee prior to July 1, 1902, had not become vested prior to that date, within the meaning of the act of June 27, 1902 (32 Stat. 406, par. 3), and that it should therefore be refunded.
>
> The law of New York, in force when the estate was in process of administration, provided (New York Code of Civil Procedure, 1899, par. 2721) that "after the expiration of one year (from the time of granting letters testamentary) the executors * * * must discharge the specific legacies bequeathed by the will and pay general legacies, if there be assets," and paragraph 2722 gave to legatees the right to petition in an appropriate court to compel payment of their legacies after the expiration of such year.
>
> Letters testamentary were granted to the appellants on June 30, 1899, and we have seen that assets abundantly sufficient to have increased the trust fund legacies of the daughters much beyond the amount at which they were assessed for taxation were in the custody of the executors prior to July 1, 1902, and therefore under this law of New York it was their duty to have made such payments prior to that date unless cause was shown for not so doing. * * *

It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon these two legacies, in an amount larger than was necessary to make them equal to, and greater than, that for which they were assessed for taxation; that for many months before that date it was the legal duty of the executors to make such payment; and that for a like time the legatees had a statutory right to institute suit to compel payment.

It is obvious that legacies which it was thus the legal duty of the executors to pay before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment, within the meaning of the act of June 27, 1902, as it was interpreted in *United States* v. *Fidelity Trust Co.* (222 U. S. 158), *McCoach* v. *Pratt* (236 U. S. 562, 567), and in *Henry* v. *United States* (251 U. S. 393). The case would be one for an increased assessment, rather than for a refund, if the war revenue act had not been repealed.

In *United States* v. *Fidelity Trust Company* (222 U. S. 158) this court held that a legacy to a trustee, in trust to hold the fund and pay over the net income to the testator's niece in quarterly payments during the period of her natural life, on which the legatee received several payments of income, is not a contingent beneficial interest, but a vested life estate and subject to the tax imposed by act of June 13, 1898, and that taxes paid on the value of such legacy

can not be recovered under the provisions of section 3 of the act of June 27, 1902, supra.

To the same effect is the decision of the circuit court of appeals, eighth circuit, in *Westhus* v. *Union Trust Company* (164 Fed. 795), where the court said:

> So far as the case holds that the tax is not imposed until the estate vests in possession or enjoyment, we are in entire accord with it, but we think there are serious objections to the position that such circumstances as those mentioned arising during the course of administration postpone the vesting in enjoyment contemplated by the statute. The express provision in the amendatory act of 1901 that the tax "shall be due and payable in one year after the death of the testator" would in itself indicate a contrary intent, at least as respects estates passing by will, and we do not doubt the principle of the provision would also apply to those passing from intestates. Nor do we think there is anything in the statute indicating that an assessment or any other affirmative act by the collector is a necessary prerequisite to the imposition of the tax and the creation of the lien upon the estate of the decedent. When the successor is entitled to the beneficial enjoyment of the estate, though he has it not in possession, the law at once imposes the tax. The ascertainment of the precise amount in dollars and cents is a detail of administration which makes certain the charge previously fixed by law upon the estate.

To the same effect also is the decision of the Circuit Court of Appeals, Eighth Circuit, in *Chauteau* v. *Allen* (170 Fed. 412).

In *Title Guarantee & Trust Company* v. *Ward* (184 Fed. 447), the facts were as follows: The testator died March 3, 1901, and the tax was assessed on September 1, 1902, after the act of June 27, 1902, became effective. The Circuit Court of Appeals, Second Circuit, said (p. 449):

> Plaintiffs contend that this tax was not "imposed" within the meaning of the act of 1902 until it was levied and assessed on September 1, 1902, and that therefore the tax is not within the saving clause of the repealing act. This contention has been disposed of adversely by this court in *Eidman* v. *Tilghman* (136 Fed. 141, 69 C. C. A. 139) and by the Supreme Court in *Hertz* v. *Woodman* (opinion filed July 1, 1910) (218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001). This point is here referred to because it is not specifically disposed of in the exhaustive opinion of Judge Ray.
>
> With the views expressed in that opinion we fully concur. The present case is readily differentiated from those relied upon by plaintiffs in the circumstance that the children of this testator are given their respective shares absolutely. They and they only have power to dispose, each of her share, having that power over the corpus, and in the meantime the enjoyment of the income. They may fairly be held to have each a vested estate of which she

> has the enjoyment. We are not persuaded by the argument that the statute requires both possession *and* enjoyment as essential to liability for the tax.

A similar decision is that of *Beer* v. *Moffatt* (192 Fed. 984).

If beneficial interests in an estate are contingent until distributable under the laws of the State of administration, as was held in *Farrell* v. *United States* (167 Fed. 639), then the converse must be true, that when such interests are distributable under the laws of the State they are no longer contingent, but become vested interests.

The decision of this court in *United States* v. *Jones* (236 U. S. 106) is not adverse to the contention of the United States in the present case. In that case this court held that the beneficial interests were contingent for the reason that the period of administration had not been terminated, the intestate's death having occurred on June 28, 1902, but three days before the repealing act took effect. No administrator had been appointed at that time, and it could not be determined what, if anything, would remain after payment of debts. The distributive shares, therefore, were not ascertainable prior to July 1, 1902. Had the period of administration been completed, however, and the period provided by the State law for settlement of the estate expired (as in the case now before this court), it is believed that the decision would have been in favor of the Gov-

ernment's contention. This inference is drawn from the excerpt of the opinion quoted below (page 112):

> So, in the practical sense, their interests are contingent and uncertain until in due course of administration it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly can not be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property.

Appellants rely upon the decision in the case of *United States* v. *Jones, supra,* to support their claim that the several beneficial interests on which taxes were imposed in the instant case had not become vested, but were still contingent on July 1, 1902.

The above case, and the one now before the court are easily distinguishable, however, as indicated by the facts hereinbefore referred to.

Nor is the case of *McCoach* v. *Pratt* (236 U. S. 562), relied on by appellants, in point. The law of Pennsylvania, under which the estate was being administered, provided that creditors had a year within which to file their claims. The beneficial interests of the legatees were not, therefore, ascertainable until the expiration of the statutory period of administration, and that period did not expire until long after the war revenue act of June 13, 1898, had been repealed. The interests of the legatees were contingent on July 1, 1902, and this court so held.

It is contended that the clear value of all of the beneficial interests or legacies involved in this case were ascertainable before July 1, 1902. The value

of the estate was known or ascertainable before that date. It was the statutory duty of the executors to make a final account and to turn over the residue of the estate to the trustees prior to July 1, 1902. It is also contended that the several legatees under the will entered into the enjoyment, if not into the actual possession, of their several legacies, and that, therefore, such legacies were vested in them, and were not on July 1, 1902, contingent. This contention is supported by the decisions of this court in the following cases: *Hertz* v. *Woodman* (218 U. S. 205, 224); *United States* v. *Fidelity Trust Company* (222 U. S. 158); *Simpson* v. *United States* (252 U. S. 547).

II.

Was the identical claim upon which this action is based presented to the Commissioner of Internal Revenue prior to January 1, 1914, as provided for by the act of July 27, 1912 (37 Stat. 240)?

In order that a suit may be maintained in the Court of Claims or in any other court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed, a claim for the amount sued for must first have been submitted to the Commissioner of Internal Revenue and the commissioner's decision in reference to the legality of the claim obtained. If no decision is rendered by the commissioner within six months from the time the claim is made, suit may be brought thereon, if brought within the limitations prescribed by section 3227, R. S. (R. S. 3226).

Sections 3226 and 3227 R. S., in so far as they are material in this case, are quoted below:

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of (the) Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had thereon: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section.
>
> SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought *within two years next after the cause of action accrued.*

The act of July 27, 1912 (37 Stat. 240), however, extended the time within which claims for the refunding of taxes alleged to have been erroneously

or illegally collected might be filed, to January 1, 1914. Section 1 of said act, upon which the appellants rely to give life to their claim, reads as follows:

> That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of sections twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act, may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

The second question considered by the Court of Claims, and now before this court for review, was whether the claim made the basis of this action was filed in compliance with the provisions of the above-quoted act.

This court has held that the act of July 27, 1912, raised the bar contained in sections 3226 and 3227, R. S., to the time for filing claims for refund. (*Rand* v. *United States*, 249 U. S. 503, 508.)

It is admitted that a certain claim was filed with the Commissioner of Internal Revenue on or about June 6, 1911, by one Mortimer L. Schiff, as trustee under the will of Abraham Wolff, deceased, for $44,305.72, claiming a refund of that sum as taxes erroneously and illegally collected by the collector of internal revenue (R. 45). This claim was filed,

not by the one who paid the taxes and who had a right to receive payment of the refund, if the taxes had been erroneously and illegally collected, but by one who had nothing to do with the payment of the taxes and who, in accordance with the provisions of the twenty-fifth paragraph of the will (R. 27) had received the trust funds after all taxes had been deducted therefrom. He was not only a stranger to the tax proceeding but is a stranger to this suit.

Claims for refunds must be made in accordance with the regulations of the Secretary of the Treasury, and such regulations have the force and effect of law and will be judicially noticed by the Federal courts. (*Hastings* v. *Herold*, 184 Fed. 759, 764. *Caha* v. *United States*, 152 U. S. 211, 221.)

The regulations promulgated by the Secretary of the Treasury and enforced during the period involved herein, reads in part as follows (R. 48):

> A claim for refunding should be made in the name of the party assessed, if living; if he is dead, there should be evidence of his death and the claim should be made in the name of the executor or administrator. Certified copies of the letters of administration or letters testamentary or other similar evidence, should be annexed to the claim to show that the claimant is administrator.

It is readily apparent therefore that Mr. Schiff, as trustee under the will, was not the proper party to make a claim for a refund of a tax paid by the executor of the will. Even if the claim had been allowed, he would have had no right to receive the amount

refunded. There was not a substantial compliance with the law and the regulations of the Secretary of the Treasury, and the claim filed by Schiff can not be made the basis of a suit against the United States by the executors.

It is also readily apparent that the claim filed on November 23, 1915, in behalf of Otto H. Kahn et al., as executors, for a refund of the amount involved in this suit, was not filed within the period of limitations prescribed by the act of July 27, 1912. The only claim filed within the statutory period is the one filed on June 6, 1911, by Mortimer L. Schiff as trustee under the will. The suit commenced in the Court of Claims by Otto H. Kahn et al., as executors, can not be based upon the claim filed by Schiff in order to avoid the limitation contained in the statute. The Schiff claim was not presented by the party who had been assessed and who had paid the tax; it was not presented by the party appearing as plaintiff in this suit, and the amount claimed to have been erroneously exacted is different from the amount claimed by the executors and involved in this suit.

The party entitled to a refund of internal tax must make the claim himself or by attorney, and may not rely upon a claim presented by parties not entitled to receive payment thereof. It was so held by this court in Rand *v.* United States, *supra*, wherein this court said (p. 510):

> The act of 1912 can not be made so compliant. It had its purpose and it is not satisfied by representative or negative action; it

> requires a positive and individual assertion of claim. The condition was easy of performance, its grant a concession, and there is no room for the plea to enlarge it beyond its words. It is direct and clear and liberal enough of itself. It says to the taxpayer: Make a claim for the tax you have paid, show its illegality, and it will be repaid to you. We can not relax its requirements—certainly not on the assumption that they might have been useless if complied with.

The claim upon which this suit is really based, and the only one which can be relied on as a basis for this suit, is the one filed by the claimants for the identical amount claimed in the suit asserting the same grounds; that is to say, that the tax was wrongly and erroneously demanded and collected *from the claimants* by the collector of internal revenue. Appellants apparently recognized this fact and accordingly filed a new and different claim on November 23, 1915. This claim was filed by the attorneys for the executors, appellants herein, who had paid the tax and who demanded a refund of $59,711.61, as having been erroneously and illegally exacted from the claimants on contingent beneficial interests. (R. 46.) This claim was filed with the Commissioner of Internal Revenue more than one year and six months after the period of limitation provided for in the act of July 27, 1912, had expired. It was therefore barred by the provisions of that act. (*Rand* v. *United States*, *supra*. *Coleman* v *United States*, 250 U. S. 30.)

In *Coleman* v. *United States, supra,* the tax had been demanded and paid under the act of June 13, 1898, on certain distributive shares of the estate of Coleman, who died prior to July 1, 1902. However, the year allowed for the settlement of the estate had not expired nor had the debts been paid prior to that date. On March 17, 1914, the claimant filed his claim for a refund of tax on the ground that it had been assessed on a contingent beneficial interest and therefore erroneously and illegally exacted. The application for a refund was refused and the claimants brought suit in the Court of Claims. That court held that the claim was barred by the act of July 27, 1912, and dismissed the petition. On appeal to this court the judgment of the Court of Claims was affirmed. The court said (p. 32):

> The present tax had not been collected when the act of June 27, 1902, was passed, but was collected afterwards contrary to its terms. There was little bounty in its application to such a case. No argument can make it plainer than do the words themselves that the act of 1912 applies to the present claim, and that it was presented too late.

The decision in the Coleman case is applicable to the facts found by the Court of Claims in the instant case, and is therefore controlling.

Appellants rely upon the decision of this court in *Sage* v. *United States* (250 U. S. 33). The facts under consideration in that case differ materially from the facts in this and the decision has no application to

the instant case. In this connection it may be proper to invite attention to the fact that the Coleman case and the Sage case were submitted on the same day and the decisions in both cases rendered by Mr. Justice Holmes on May 19, 1919. The Court of Claims had dismissed the petition in both cases and, as the judgment of the Court of Claims was affirmed in the Coleman case and reversed in the Sage case, and as the decision in the Coleman case is so applicable to the facts in the instant case, it is apparent that the decision in the Sage case can have no application to the case now under consideration.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims, denying recovery of any sum whatever and dismissing claimants' petition, should be affirmed.

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KAHN ET AL., EXECUTORS OF WOLFF, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 52. Argued November 15, 1921.—Decided December 5, 1921.

Legacies of life interests in trust funds *held* vested in possession or enjoyment prior to July 1, 1902, within the meaning of the Refunding Act of June 27, 1902, and taxable under § 29 of the War Revenue Act of 1898, where, on or before July 1, 1902, the amounts of the legacies were ascertainable, all claims against the estate, save some for other taxes of relatively small amount, had been settled or barred, and the trustees were entitled to immediate possession of the funds from the executors and the beneficiaries to the beneficial enjoyment of the income. P. 247.

55 Ct. Clms. 271, affirmed.

APPEAL from a judgment rejecting a claim for a refund of legacy taxes.

Mr. H. T. Newcomb, with whom *Mr. Frederick L. Fishback* was on the brief, for appellants.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox* were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the Court of Claims by the executors of Abraham Wolff of New Jersey to have refunded $58,885.86 paid in taxes assessed upon legacies under the provisions of § 29 of the Act of June 13, 1898,

c. 448, 30 Stat. 448, 464–465. Wolff died on October 1, 1900. The taxes were paid on November 4, 1903. This suit was begun July 2, 1917. The contention is that the legacies were contingent beneficial interests not vested in possession or enjoyment on, or prior to, July 1, 1902; and that hence the amount paid is recoverable under the Acts of June 27, 1902, c. 1160, § 3, 32 Stat. 406, and of July 27, 1912, c. 256, 37 Stat. 240. The lower court dismissed the petition. Whether the interests assessed were contingent on July 1, 1902, and whether the claim sued on had been presented to the Commissioner of Internal Revenue as required by the Act of 1912, are the questions argued before us. The view we take of the first question renders it unnecessary to consider the second.

Earlier decisions have settled the construction of these statutes. The test to be applied in determining whether the legacies were, on July 1, 1902, still contingent is a practical, not a technical one. The beneficial interests were contingent unless the legatees were then in actual possession or enjoyment, *Henry* v. *United States,* 251 U. S. 393, or were entitled to immediate possession or enjoyment, *United States* v. *Jones,* 236 U. S. 106; *McCoach* v. *Pratt,* 236 U. S. 562; *Coleman* v. *United States,* 250 U. S. 30; *Sage* v. *United States,* 250 U. S. 33. But a gift to trustees of a fund, the net income of which is to be paid over periodically during life, is, at least after the payments have commenced, a life estate, not a contingent beneficial interest. *United States* v. *Fidelity Trust Co.,* 222 U. S. 158. And the mere failure of executors to establish the trust fund will not prevent the vesting of a legacy, if under the state law the time for payment has come, the right thereto is uncontroverted, and it is clear that the money retained will not be needed to satisfy outstanding claims. *Simpson* v. *United States,* 252 U. S. 547.

Wolff provided by his will, among other things, for fifteen separate trust funds, ranging in amount from

$20,000 to $100,000 and aggregating $730,000. The income of each was made payable for life to the beneficiary without power of anticipation or assignment. Provision was made that the executors should, until the several trusts were established, pay monthly to each a sum named; and these amounts were approximately, but not exactly, proportionate to the probable income of the respective funds. There was also a provision that if the aggregate amount of the funds to be so established should exceed one-fifth of the net estate, each should be proportionately reduced. A trust of the residue was provided for the benefit of the testator's daughters. The amount or value of the fifteen trusts was ascertainable before July 1, 1902. None of the funds directed to be paid to the trustees had been paid to them, or set apart or established by that date; but no reason was shown why they should not have been. The value of the estate (over seven million dollars) was such, and was before that date known to be such, that no pending controversy or outstanding claim could affect the value of any but the residuary legacies; and these only to a slight extent. The executors paid before that date certain small legacies, the fixed monthly allowances to the fifteen beneficiaries, and to each of the residuary legatees, as income, more than $300,000.

The will was admitted to probate by the Orphans Court for Morris County, on November 7, 1900, and letters testamentary issued on that day. By the law of New Jersey executors are required to state and settle their accounts within a year after their appointment, unless the time is extended for cause. The Orphans Court is empowered to fix a period of nine months for the presentation of claims against the estate; and claims not presented within that time may be declared barred. If no time is fixed in a will for the payment of legacies they are payable within a year after the probate; and if not so paid, legatees may maintain an action therefor. Publication of

the notice to creditors to present their claims within nine months was begun on November 7, 1900. On August 8, 1901, that court entered an order declaring that creditors who had neglected to do so, were barred. On July 1, 1902, the only unadjusted matters, so far as shown, were claims for taxes for relatively small sums. These were not finally disposed of until November, 1903.

On July 1, 1902, therefore, the trustees were entitled to the possession of the funds and all the beneficiaries to the immediate enjoyment of the income thereof, with the exception of the amount involved in controversies over taxes. The executors might then have paid over the balance of the estate in their hands to the trustees, retaining funds sufficient to satisfy the claims in dispute. The amount on which the taxes here in question were assessed is not shown to have exceeded the amount of such balance. The beneficial interests were, therefore, vested; and taxes were properly assessed thereon. In *Vanderbilt* v. *Eidman*, 196 U. S. 480, and *Uterhart* v. *United States*, 240 U. S. 598, the facts were different.

Affirmed.